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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 610 (AFL-CIO) ET AL.,
Petitioners,

v.

PAUL E. SCOTT, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1) Whether 42 U.S.C. § 1985(3) protects against interference with rights that, in contrast to the right to travel (at issue in *Griffin* v. *Breckenridge*, 493 U.S. 88), are protected by the Constitution only against state action, where no state action is alleged or proved?

2) Whether individuals who desire to work with others under either union or nonunion conditions, and are for that reason prevented from doing so, comprise a class protected by § 1985(3)?

3) Whether individuals who are not members of a § 1985(3) protected class may nevertheless bring a § 1985(3) suit for damages?*

---

* The parties to this case are
Paul E. Scott
James T. Matthews
A. A. Cross
A. A. Cross Construction Co., Inc.
Bill Moore
Robert Wayne Fault
Bruce Hill
Curtis Beasley
Jay Desormaux
Fish Ferguson
John Wallace, Jr.
Asbestos Workers, Local 22
Asbestos Workers, Local 112
Boilermakers, Local 587
Bricklayers, Local 13
Carpenters, Local 610
Carpenters, Local 753
Carpenters, Local 2007
Cement Masons, Local 884
Cement Masons, Local 804
Lathers, Local 416
Pipefitters, Local 2484
Engineers, Local 450
Painters, Local 328

Pipefitters, Local 1347
Pipefitters, Local 195
Plumbers, Local 504
Electrical Workers, Local 479
Ironworkers, Local 125
Laborers, Local 852
Roofers, Local 116
Sheet Metal Workers, Local 196
Teamsters, Local 920
Laborers, Local 870
Sabine Area Building Trades Council

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UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 610 (AFL-CIO) ET AL.,
Petitioners,

v.

PAUL E. SCOTT, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United Brotherhood of Carpenters and Joiners of America, Local 610 (AFL-CIO), United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industries of the United States and Canada, Local 195 (AFL-CIO), and the United Brotherhood of Carpenters and Joiners of America, Local 753 (AFL-CIO) respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Scott* v. *Moore*, C.A. 5 No. 79-1196 (July 1, 1982).

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals is reported at 680 F.2d 979 and is reproduced at pp. A-1 to A-55

of the separately bound appendix to this petition ("App."). The panel opinion of the Court of Appeals is reported at 640 F.2d 708 and is reproduced at App. B-1 to B-29. The opinion of the District Court is reported at 461 F.Supp. 224 and is reproduced at App. C-1 to C-11.

JURISDICTION

The *en banc* decision and the judgment of the Court of Appeals were issued on July 1, 1982. App. A-1 to A-55 and E-1 to E-2. The jurisdiction of the District Court was invoked under 42 U.S.C. § 1985(3). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves, Rev. Stat. § 1980, 42 U.S.C. § 1985 (3), which provides in pertinent part:

> If two or more persons in any State or Territory conspire, or go in disguise on th ehighway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws * * * [and] in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a claim of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more the conspirators.[1]

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[1] 42 U.S.C. § 1985(3) is "the surviving version of § 2 of the Civil Rights Act of 1871." *Great American Fed. S. & L. Assn. v. Novotny*, 442 U.S. 366, 368. That provision is occasionally referred to as "§ 1985(c)." See, e.g., 442 U.S. at 368.

STATEMENT OF THE CASE

A. Factual Background.

For the purpose of this petition, we accept the following description of the parties and the background facts in the majority opinion below: [2]

> This case arises out of an episode of mob violence [at the Cross Construction Co.'s Alligator Bayou Pumping Station construction project near Port Arthur, Texas (during which company employees were injured and company equipment and other property was damaged)] that occurred in the early morning hours of January 17, 1975. The plaintiffs are A. A. Cross Construction Company, Inc., and two of its employees, Paul Scott and James Matthews. The defendants include the Sabine Area Building and Construction Trades Council, a loose confederation of craft and construction unions located in the Port Arthur, Texas, area. Also named as defendants are twenty-five of the Council's member unions and several individual members of some of these labor unions.
>
> • • • •
>
> A. A. Cross Construction Company is a Texas corporation engaged in the building and construction industry as a general contractor. In May, 1974, Cross contracted with the Department of the Army, United States Corps of Engineers to erect the Alligator Bayou Pumping Station and Gravity Drainage Structure on the hurricane levee along Taylor's Bayou near Port Arthur.
>
> • • • •
>
> In accordance with its customary practice, the Cross Construction Company hired its workers for the Alligator Bayou project without regard to union

[2] The omitted portion of that court's description pertains in large part to the identity of those responsible for the January 17, 1975 incident, an issue not addressed by the petition.

affiliation, employing persons solely on the basis of its own need for the applicant's occupational skills. Cross did not have a collective bargaining agreement with any labor union, and when this incident occurred no union was seeking to organize the company's employees. In addition, Cross often hired workers from outside the Port Arthur community.

* * * *

* * * The entire [January 17] episode lasted only a few minutes, but the destruction was devastating. Cross and his employees were treated for their [resulting] injuries at a local hospital, and work at the construction site did not resume for nearly three weeks. Some of Cross's employees, frightened by the possibility of repeated attacks at the jobsite, refused to return to work. In addition, the violence and vandalism delayed the completion of the project by about six months, ultimately causing the Cross Construction Company to default in its contractual obligation to the U.S. Army Corps of Engineers. [App. A-4 to A-6.]

B. Proceedings in the District Court.

On January 31, 1975, plaintiffs Scott and Matthews initiated this lawsuit against the individual defendants. The plaintiffs sought and obtained a temporary injunction against violent, intimidating, or destructive acts against employees at the Alligator Bayou Pumping Station project. Nearly two years later, the plaintiffs amended their complaint, adding A. A. Cross Construction Company, Inc., as a plaintiff and the Sabine Area Building and Construction Trades Council and twenty-five local unions as defendants.

After trial, the district court found that the plaintiffs had proved that the defendants conspired to deprive them of the equal protection of the laws in violation of 42 U.S.C. § 1985(3). That court made the preliminary injunction permanent against all the defendants except one

of the local unions. The district court also assessed damages against eleven of the local unions: the individual plaintiffs were each awarded $5,000.00; palintiff Cross Construction Company was awarded $112,385.14. App. D-1 to D-5.

C. Proceedings in the Court of Appeals.

The defendants appealed. All the unions objected to the injunction as inconsistent with the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §§ 101 *et seq.* The defendants against whom damages had been awarded appealed on the grounds that the plaintiffs had not established a cause of action under 42 U.S.C. § 1985(3), and that the responsibility of the individual organizations had not properly been established under § 6 of the Norris-LaGuardia Act's "clear proof" standard of agency (which they urged governs) or even under the common law's standard of agency.

A panel of the Court of Appeals: sustained the injunction (App. B-7 to B-9); held that a claim under 42 U.S.C. § 1985(3) was stated (App. B-9 to B-20); and held also that § 6 of the Norris-LaGuardia Act is inapplicable (App. B-23 to B-25). However, that court determined that under common law principles of agency the evidence adduced at trial was sufficient to establish the liability of only three of the unions (the present petitioners) and reversed the damages judgment against all the other union defendants (App. B-25 to B-28).

The Court of Appeals then agreed to rehear the case *en banc*, and on rehearing reaffirmed by a 14-10 vote the panel's judgment in all respects. In an opinion by Judge Charles Clark (the author of the panel opinion), that court concluded as follows:

> In summary, we hold that (1) the anti-injunction provisions of the Norris-LaGuardia Act do not deprive the district court of jurisdiction to enjoin violence, and (2) Congress intended 42 U.S.C.

> § 1985(3) to provide a remedy for private conspiracies directed at nonracial classes. Specifically, we determine that the statute encompasses a conspiracy designed to deprive nonunion workers of the First Amendment right to freely associate with one another where that conspiracy does not occur in conjunction with legitimate union activity and is perfected by force and violence. In addition, we hold that the Commerce Clause empowers Congress to reach the private conspiracy involved in the case before us. Furthermore, since this case does not involve a labor union participating or interested in a labor dispute within the meaning of 29 U.S.C. § 113 (c), the clear-proof standard of 29 U.S.C. § 106 is inapplicable. We conclude that the district court's findings that the Carpenters Local 610, Pipefitters Local 195, and Carpenters Local 753 authorized or participated in this conspiracy were not clearly erroneous. Nevertheless, we find that the evidence of participation in the conspiracy is insufficient to warrant the district court's judgment against the remaining eight unions. [App. A-29 to A-30.]

The principal dissent by Judges Rubin and Williams for eight members of that court concluded: that the injunction is not authorized by the Norris-LaGuardia Act (Point I, App. A-31 to A-36); that § 1985(3) does not grant a cause of action for the defendants' conduct (Point II, App. A-36 to A-49); and that none of the union defendants could be held liable for damages both because § 6 of the Norris-LaGuardia Act does apply, and because there was insufficient evidence that any of the defendants were responsible under common law agency principles (Point III, App. A-49 to A-50). Judge Anderson filed a separate dissenting opinion agreeing with the principal dissent on Points I and III, and not reaching the § 1985(3) issue. App. A-50. Judge Garwood also filed a separate dissenting opinion concluding that the plaintiffs did not state a cause of action under 42 U.S.C. § 1985(3). App. A-50 to A-55.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS' DECISION ON IMPORTANT QUESTIONS OF FEDERAL LAW IS IN CLEAR CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

Introduction

In *Griffin* v. *Breckenridge*, 403 U.S. 88 ("*Griffin*"), this Court determined that a complaint based on 42 U.S.C. § 1985(3) against a private conspiracy states a cause of action if the complaint:

> allege[s] that the defendants did (1) "conspire or go in disguise on the highway or on the premises of another" (2) "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." It must then assert that one or more of the conspirators (3) did, or caused to be done, "any act in furtherance of the object of [the] conspiracy," whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States." [403 U.S. at 102-103.]

In this respect, *Griffin* overruled *Collins* v. *Hardyman*, 341 U.S. 651, which had held that only conspiracies under color of state law are actionable under § 1985(3). But the *Griffin* Court emphasized that the conclusion that "the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious conspiratorial interferences with the rights of others" (403 U.S. at 101). And the *Griffin* opinion takes pains to avoid the path of "interpreting § 1985(3) as a general federal tort law" by

> requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. See the remarks of Representatives Willard and

> Shellabarger, quoted *supra*, at 100. The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all. [403 U.S. at 102, footnotes omitted, emphasis in original.]

There is, we believe, no need to belabor the consequences for the federal courts' ability to discharge their other responsibilities of reading § 1985(3) as a "general federal tort law." And the decision below is a particularly notable instance of a court of appeals taking an expansive view of § 1985(3) in order to transmute a claim for misconduct that would be actionable in state court under the common law of torts[3] into a cause of action triable in federal court. In so doing, the majority of the court below resolved in plaintiffs' favor three distinct issues, each of which is of fundamental and recurring importance in § 1985(3) litigation, and as to each of which there are, as we shall now show, squarely conflicting decisions in other circuits:

1) Whether § 1985(3) protects against interference with rights that, in contrast to the right to travel (at issue in *Griffin* itself), are protected by the Constitution only against state action, where no state action is alleged or proved?

2) Whether individuals who desire to work with others under either union or nonunion conditions, and are for that reason prevented from doing so, comprise a class protected by § 1985(3)?

3) Whether individuals who are not members of a § 1985(3) protected class may nevertheless bring a § 1985(3) suit for damages?

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[3] See, e.g., *United Workers v. Laburnum Corp.*, 347 U.S. 656; *Automobile Workers v. Russell*, 356 U.S. 634.

A. The Conflicting Decisions on Whether a § 1985(3) Claim Based On Private Interference With Associational Rights States a Cause of Action.

The majority below determined that the defendants' private conspiracy violated an associational right of the plaintiffs protected by the Fourteenth Amendment[4] and is therefore actionable under § 1985(3) despite the absence of any evidence that it was an object of the conspiracy to cause any governmental interference whatsoever with that right. App. A-9 to A-12. The holding that § 1985(3) is applicable although the objective of the conspiracy does not encompass governmental interference with the plaintiff's associational freedom is squarely contrary to Judge (now Justice) Stevens' reading of § 1983 (3) in *Dombrowski v. Dowling*, 459 F.2d 190 (C.A. 7) ("*Dowling*"): Where a § 1985(3) plaintiff claims interference with a right that has its source in the Fourteenth Amendment there must be state involvement of some kind because the Fourteenth Amendment (unlike

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[4] In their principal dissent Judges Rubin and Williams say:

> Our colleagues interpret § 1985(3) to find that it protects a *constitutional* right of association, or more specifically, the *constitutional* right, first found to exist in this very opinion, of nonunion workers to work with other nonunion workers. This right is analogized to the right of political association. Protection for political association is thus expanded into protection for any kind of association having some economic community of interest. This seems to us to confuse the *right* protected with the *class of persons* protected. Although there is a constitutional right to refuse to work, no court, so far as we know, has ever previously found thatworkers have a constitutional right to work only with the kind of persons they choose to work with. [App. A-42, emphasis in original.]

We believe that the foregoing objection to the majority's reasoning is sound and reserve our position thereon for the Court's consideration if review is granted. Further discussion of this point now is particularly unnecessary because, as the principal dissent notes, this aspect of the majority below's reasoning "confuse[s] the *right* protected with the *class of persons* protected", and the "class" issue, which independently merits review, is discussed in Point B, *infra*.

the Thirteenth Amendment and the constitutional right to travel) protects only against state action. In *Great American Fed. S. & L. Assn v. Novotny*, 442 U.S. 366 (*"Novotny"*), while the Court did not reach the issue, Justice Stevens' concurring opinion reiterates the *Dowling* analysis and conclusion. 442 U.S. 384-385. And in his concurring opinion therein, Justice Powell approved *Dowling's* analysis and conclusion. 442 U.S. at 378-381. See also the principal dissent at App. A-36 to A-42 and Judge Garwood's dissent at App. A-50 to A-53.

The majority below expressly acknowledged a conflict between its decision and that in *Dowling* and discussed at some length its grounds for sustaining plaintiffs' claim although *Dowling's* reasoning would require rejection of that claim. Indeed, the court below acknowledged: that the "Seventh Circuit subsequently extended the *Dowling* rationale in *Murphy v. Mount Carmel High School*, 543 F.2d 1189 (7th Cir. 1976), expressly holding that section 1985(3) provides no remedy for purely private impairment of First Amendment speech and associational freedom" (App. A-12);[5] and that the view of the Fourth Circuit is in accord with that of the Seventh (App. A-12 citing *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (C.A. 4)). More recently, the First Circuit has aligned itself with the Fourth and Seventh Circuits. *Rice v. New England College*, 676 F.2d 9, 11 (C.A. 1). However, *Action v. Gannon*, 450 F.2d 1117 (C.A. 8 *en banc*) is in accord with the decision below on this issue.

In sum, the Fifth and Eighth Circuits' conclusion that a claim of a private conspiracy to interfere with associational rights states a § 1985(3) cause of action is in direct conflict with the conclusion of the First, Fourth and Seventh Circuits that such a claim does not state a § 1985(3) cause of action. And, we submit, *Dowling's*

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[5] One of the plaintiffs in *Murphy*, appellant Senese, asserted the identical right claimed by the employee-plaintiffs here—to work with other nonunion employees (see 543 F.2d at 1191, 1192).

close-textured analysis of the statute's language, structure and history and of the *Griffin* opinion, is not only the majority view but is also entirely sound.[6]

B. The Conflicting Decisions On The Type Of Class-Based Animus That Is Cognizable Under § 1985(3).

(i) In *Griffin*, the Court expressly reserved the question whether "a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3)" relating to "equal protection, or equal privileges and immunities" (403 U.S. at 102, n.9). The courts of appeals have generally answered that question in the affirmative, but there agreement ends. The decisions collected in the majority opinion (App. A-15) and in the principal dissent (App. A-45), reveal a series of seemingly *ad hoc* determinations which invite federal litigation. As one commentator has observed:

> While the class-based animus requirement is superior to other limitations designed to prevent the creation of a general federal tort remedy because it gives full effect to the original congressional purpose, it has also been the most elusive and inconsistently applied of the section 1985(c) elements. [*The Class-Based Animus Requirement of 42 U.S.C. § 1985(c): A Suggested Approach*, 64 Minn. L. Rev. 635, 641 (1980).]

(ii) In addition to the general confusion among the courts of appeals in identifying protected and unprotected classes for the purposes of § 1985(3), there is a more particularized conflict between the decision below and those of other courts of appeals. The Fifth Circuit's judgment herein depends on the proposition that nonunion individuals who are prevented from working by violence are protected by § 1985(3). The Sixth Circuit has squarely held to the contrary in *Browder* v. *Tipton*, 630

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[6] For the Court's convenience the relevant portion of *Dowling* is reproduced as an appendix to this petition.

F.2d 1149 (C.A. 6).[7] *Browder*, as the Sixth Circuit noted, had been anticipated by its earlier decisions excluding from § 1985(3) protection "classes formed by corporation employees fired for filing OSHA complaints, *Taylor* v. *Brighton Corp.*, 616 F.2d 256 [and] a non-Union employer, *Ohio Inns, Inc.* v. *Nye*, 542 F.2d 673 (6th Cir. 1976)" (630 F.2d at 1152).

Moreover, the Tenth Circuit has held that an allegation of a conspiracy against the plaintiff to deprive her "and other employees 'who were engaged in organizing a labor union' of the equal protection and enjoyment of the laws of the United States" does not state a § 1985(3) claim. *Silkwood* v. *Kerr-McGee Corp.*, 637 F.2d 743, 746 (C.A. 10). That court explained:

> To state a cause of action under section 1985(3) the law requires prejudice against a class *quo* class. Here it seems clear from the complaint as a whole that the feud, * * * is private; no general prejudice which transcends the immediate dispute is shown. Rather the hatred which defendants allegedly harbor is against [plaintiffs] arising out of the activities of the parties involved. See *Lessman* v. *McCormick*, 591 F.2d 605, 608 (10th Cir. 1979). We hold this is essentially a private feud not within the intended scope of the Act's coverage. As was aptly stated by the district court, to hold otherwise would make § 1985(3)

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[7] In *Browder*, Judge Merritt wrote:

> By failing to show the unique fashion in which they exercise a fundamental right, plaintiffs fail to allege that they are members of a protected class. Defendants here, given their motive, would have thwarted due process for all those—and only those—who crossed the picket line. Crossing a picket line is not a special exercise of the right to a probable cause arrest in the same sense—to use another of [Sen.] Edmunds' examples—that being a Democrat is a discrete and particular exercise of the First Amendment. Thus, plaintiffs' class is simply one of picket line crossers. No matter how "invidious" any discrimination against this class may be, the right to cross a picket line is no more constitutionally protected than is the right to be an unpopular barn owner. [630 F.2d at 1154].

> "applicable to all conspiratorial interferences with the rights of others, as there are no bounds upon the ingenuity of counsel in pleading novel and diverse classes to fit every conceivable situation." 460 F. Supp. at 407. [637 F.2d at 748]

On the facts found below, in this case, as in *Silkwood*, "the feud, * * * is private; no general prejudice which transcends the immediate dispute is shown. Rather the hatred which defendants allegedly harbor is against [plaintiffs] arising out of the activities of the parties involved." *Id.* at 748. As the principal dissent herein pointedly observed:

> It is difficult for us to divine exactly what class is intended by [the majority's] differing [definitional] phrases, for the evidence makes it clear that [plaintiffs] Scott and Matthews were not attacked because they were not union members or because they wished to work with "other" nonunion members, but because they chose to work for Cross Construction, a firm that hired nonunion workers and did not pay union wages. [App. A-43, footnote omitted, referring to the majority opinion below at A-18]

Thus, on this issue, as on the private interference with associational rights issue, there is a clear court of appeals conflict and the Fifth Circuit's expansive reading of § 1985(3) is the minority view.

(iii) The determination that the individual plaintiffs are members of a class protected by § 1985(3) conflicts not only with decisions of other courts of appeals but, in one vital respect also with this Court's analysis of the statute in *Novotny*. The majority below said:

> Similarly, acknowledging that the scope of the statute includes nonunion workers who are attacked for their choice to associate with other non-union workers, thereby enabling an employer to offer significant work to the class, is appropriate in light of subsequently enacted federal legislation. [App. A-18.]

The "federal legislation" thus referred to is the National Labor Relations Act as amended by the Taft-Hartley

Act. Specifically, the majority below relied on the amendment to § 7 that protects "the right to refrain from", *inter alia*, forming, joining or assisting labor organizations, and on the adoption of § 8(b)(1) which declares it to be an unfair labor practice to restrain and coerce employees in the exercise of § 7 rights. App. A-18 to A-19. The majority's reliance on the NLRA is contrary to the reasoning of *Novotny*. The Court there held that § 1985(3) may not be invoked to redress violations of Title VII of the Civil Rights Act of 1964 because Title VII establishes a comprehensive plan of administrative and judicial process for vindicating the rights declared therein. See 442 U.S. at 372-378. The same is, of course, true of the NLRA, § 10 of which provides that the National Labor Relations Board shall remedy violations of the Act, including interference with the rights stated in § 7. The majority below thus relies on a factor expressly disapproved in *Novotny*—other federal legislation declaring the same conduct to be illegal.

C. The Conflicting Decisions On the Persons Entitled to Sue Under § 1985(3).

The majority below recognized that the plaintiff-employer, Cross Construction Company, is not a member of the class of nonunion employees which the majority below determined to be protected. App. A-9. Nevertheless, the holding below is that this plaintiff is entitled to sue under § 1985(3) for its injuries. App. A-19 to A-20. The principal dissent expressly disagreed. App. A-46 to A-47. As both the majority below and the dissent recognized, the Ninth Circuit has reached the conclusion opposite to that reached in this case. See *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711 (C.A. 9), *cert. den.*, 454 U.S. 967:

> The law of this circuit is clear: the plaintiff must be a member of the class discriminated against to claim the benefits of § 1985(3). *Briley v. California*, 564 F.2d 849, 859 (9th Cir. 1977); *Lopez v. Arrowhead Ranches*, 523 F.2d 924, 927 (9th Cir. 1975). [641 F.2d at 721.]

D. The Importance of the Questions Presented.

The majority below recognized at the outset of its opinion: "This appeal presents important questions concerning the scope of relief available under 42 U.S.C. § 1985(3), the extent of congressional power to enact a civil remedy for wholly private infringement of constitutional rights, and the relationship between Section 1985(3) and the labor relations laws." App. A-4.[8] Indeed it is fair to say that the three questions presented here comprise the entire corpus of the basic questions concerning the meaning of § 1985(3) that are open after *Griffin* and *Novotny*. Given the conflict and confusion in the courts of appeals on these important and difficult questions concerning a critical provision defining the scope and nature of the federal court's jurisdiction, and given that the holdings below on the first and last of these questions are expressly stated in the broadest terms we note only one additional point.

At the conclusion of its discussion of the scope of the protected class (App. A-20) the majority below endeavors, in the dissenting judges' apt metaphor, to reconfine the genie in the bottle. The result, however, is to create further uncertainty. The principal dissent's critique merits quotation in full:

> Recognizing implicitly that they have released a brand new federal tort, our colleagues attempt in

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[8] This petition does not call into question the holding below that the Commerce Clause empowers Congress to provide a remedy to prohibit the activities in this case. (Of course, as noted earlier, Congress has done just that in § 8(b)(1) of the Taft-Hartley Act.) We do believe, however, that the felt necessity of the majority below to rely on the Commerce Clause, rather than the Fourteenth Amendment, as the constitutional source of congressional power (App. A-21 to A-23) reflects adversely on its statutory interpretation. Section 1985(3) was unquestionably part of legislation to enforce the Fourteenth Amendment and the fortuity that this particular incident affected interstate commerce should therefore be irrelevant in determining whether the incident is covered by the statute. See the principal dissent at App. A-47 to A-48; Garwood, J., dissenting at App. A-54 to A-55.

dicta to enclose this genie in a larger bottle. They say that they would not extend § 1985(3) to *every* kind of unlawful conduct, only to the limited instance where "there is no campaign to organize employees *and* force or violence is used to stake out one group's territorial claim and to deprive other workers and their employer of the right to freely associate with one another." We see no basis in the statute for distinguishing violent unlawful conduct from other kinds of unlawful activity such as unfair labor practices, secondary boycotts, and criminal libel, or, indeed, criminally reckless driving. The rationale of the decision cannot be thus confined save by ipse dixit. (If the decision is based on principle, and not like Justice Roberts' railway ticket, "good for this day and train only," it extends logically not only to a multitude of "classes" having some sort of economic or "associational" tie but protects each member of those classes against any kind of unlawful conduct that results in bodily injury, or even, perhaps, economic harm. [App. A-48 to A-49; footnotes omitted.]

CONCLUSION

For the above stated reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

The Discussion of Whether 42 U.S.C. § 1985(3) Applies to Private Interference With Associational Rights in *Dombrowski* v. *Dowling*, 459 F.2d 190, 193-196 (C.A. 7):

Plaintiff does not contend that the defendants acted under color of state law, or that there was any state involvement in the discrimination. Since it is clear that this section covers purely private conspiracies, *Griffin* v. *Breckenridge* 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338, it is often assumed that state action is never an element of a § 1985(3) violation. The validity of this assumption is open to some question.

* * * *

These questions are illuminated by identifying a distinction between the interests of the plaintiff tht the statute was enacted to protect and the conduct of the defendants which it proscribes, and by considering the relationship between §§ 1983 and 1985(3), the respective lineal descendants of §§ 1 and 2 of the Ku Klux Plan Act of 1871.

Although the point is sometimes obscured or overlooked, 1983 contains two quite distinct "state involvement" requirements. The first is clearly stated in the statute: the defendants must have acted "under color of" state law. The second inheres in the nature of plaintiff's protected rights: he may not be deprived "of any rights, privileges, or immunities secured by the Constitution and laws." His Fourteenth Amendment right to protection against discrimination extends only to cases in which state action is involved.

Section 1985(3) does not expressly identify any "state involvement" requirement. The most obvious difference in language between §§ 1983 and 1985(3) is the omission from the latter of the "under color of state law" language included in the former. *Griffin* v. *Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338, has squarely held that

this omission is significant and that the latter statute applies to purely private conspiracies, whereas the former applies only to conduct under color of state law. The omitted language, however, is directed to the proscribed conduct of the defendants rather than the nature of the plaintiffs' rights which are protected by the statute. Thus, although Griffin makes it perfectly clear that some purely private conspiracies among defendants are proscribed by § 1985(3), Griffin did not purport to delineate the scope of the rights secured by the statute.

With respect to plaintiff's protected interests, the language of §§ 1983 and 1985(3) also differs, but the coverage of the two provisions is probably co-extensive. Thus, the state involvement aspects of § 1983 cases which are directed to the "protected interests" rather than the "proscribed conduct" portion of § 1983 are relevant in understanding the coverage of § 1985(3). The breadth of the statute's coverage is yet to be determined, but three categories of protected rights have been plainly identified. *Griffin* gives express recognition to a black citizen's Thirteenth Amendment rights and to his federal right to travel interstate; the title of the statute expressly identifies the third category, namely, rights protected by the Fourteenth Amendment. We think the § 1983 cases make it clear that in this third category a "state involvement" requirement must survive *Griffin*.

Since plaintiff is white and claims no abridgement of his constitutional right to travel, the holding of *Griffin* does not control this case. Indeed, the Court expressly noted that it was not deciding "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable" under § 1985(3). Thus, the Court did not have occasion to consider the effect of the statute on private conspiracies designed to deprive the plaintiff of rights protected by the Fourteenth Amendment.

The Court has, however, considered the application of a comparable statute, 18 U.S.C. § 241, in this area. In *United States* v. *Guest*, 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239, the Court sustained an indictment of private citizens who had allegedly conspired to deny Negro citizens their right to equal utilization of public facilities operated by the State of Georgia. It is a fair distillation of the four opinions filed in that case to state that, although there was disagreement within the Court on the question whether defendants' private conduct would have been proscribed if there had been no cooperative action by state officers, all members of the Court recognized the need for state involvement in the provision of facilities to which the victims of the conspiracy were denied equal access. In short, the right secured by the Equal Protection clause of the Fourteenth Amendment is a right to protection against unequal treatment by a state.

Since the Fourteenth Amendment, unlike the Thirteenth, affords the plaintiff no protection against discrimination in which there is no state involvement of any kind, a private conspiracy which arbitrarily denies him access to private property does not abridge his Fourteenth Amendment rights. We therefore conclude that an arbitrary business discrimination against lawyers engaged in the practice of criminal law does not deprive plaintiff of "equal protection of the laws" within the meaning of § 1985(3) if there is no state involvement whatsoever in the discrimination. [Footnotes omitted.]

82-486

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 610 (AFL-CIO) ET AL.,
Petitioners,

v.

PAUL E. SCOTT, ET AL.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

FORMER FIFTH

Paul E. SCOTT, et al., Plaintiffs-Appellees,

v.

Bill MOORE, et al., Defendants,

Laborers International Union of North America, Local No. 870, et al., Defendants-Appellants,

International Union of Operating Engineers, etc., AFL-CIO, Local 450, Defendant-Appellant.

No. 79-1196.

United States Court of Appeals, Fifth Circuit.*

July 1, 1982.

Construction company and two of its employees brought action against trades council, its unions, and individual union members, alleging that defendants conspired for purpose of depriving plaintiffs of the equal protection of the laws and equal privileges and immunities under the law when they planned and executed an attack on construction site. The United States District Court for the Eastern District of Texas, 461 F.Supp. 224, Joe J. Fisher, J., entered judgment in favor of plaintiff, and certain defendants appealed. The Court of Appeals, 640 F.2d 708, affirmed in part and reversed in part. After rehearing en banc, the Court of Appeals, Charles Clark, Circuit Judge, held that: (1) civil rights conspiracy statute encompassed conspiracy designed to deprive nonunion workers and their employer of First Amendment right of free association where conspiracy, which was motivated by defendants' hostility toward nonunion workers and employers who hired them, was furthered by physical assaults and beatings and destruction of property, and (2) findings that certain unions authorized or participated in conspiracy aimed at intimidating and coercing nonunion workers from working or being employed within a "union area" were not clearly erroneous; however, evidence of participation in the conspiracy was insufficient to warrant judgment against the remaining eight unions.

Affirmed in part and reversed in part.

Alvin B. Rubin and Jerre S. Williams, Circuit Judges, filed dissenting opinion in which Brown, Vance, Kravitch, Randall, Tate, and Sam D. Johnson, Circuit Judges, joined.

R. Lanier Anderson, III, Circuit Judge, filed dissenting opinion.

Garwood, Circuit Judge, filed dissenting opinion.

1. Labor Relations ⇐870

Norris-LaGuardia Act did not deprive district court of jurisdiction to enjoin labor organizations not to combine, conspire, threaten, intimidate, assault or commit any act of violence toward or upon any person, property or possession of any person or his family who worked upon, traveled to, or delivered materials, goods, or services to construction company or to construction site. Norris-LaGuardia Act § 5, 29 U.S.C.A. § 105.

2. Labor Relations ⇐855

Norris-LaGuardia Act's prohibition against federal injunctive relief merely re-

* Former Fifth Circuit case, section 9(1) of Public Law 96-452—October 14, 1980.

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stricts court's power to enjoin concerted or conspiratorial activity where the conduct to be enjoined is legitimate activity of a labor union. Norris-LaGuardia Act, §§ 4, 5, 29 U.S.C.A. §§ 104, 105.

3. Conspiracy ⇐7.6

Civil rights conspiracy statute encompassed conspiracy designed to deprive nonunion workers and their employer of First Amendment right of free association where conspiracy, which was motivated by defendants' hostility toward nonunion workers and employers who hired them, was furthered by physical assaults and beatings and destruction of property. U.S.C.A.Const. Amends. 1, 14; 42 U.S.C.A. § 1985(3).

4. Constitutional Law ⇐274.1(1)

Guaranties afforded by First Amendment are protected by due process clause of Fourteenth Amendment. U.S.C.A.Const. Amends. 1, 14.

5. Constitutional Law ⇐91

Right of free association is closely aligned with right of free speech and is protected by First Amendment. U.S.C.A. Const.Amend. 1.

6. Conspiracy ⇐7.6

Civil rights conspiracy statute protects against private infringement on First Amendment freedoms. U.S.C.A.Const. Amend. 1; 42 U.S.C.A. § 1985(3).

7. Conspiracy ⇐7.6

Civil rights conspiracy statute reaches all deprivations of equal protection, whatever their source. 42 U.S.C.A. § 1985(3); U.S.C.A.Const.Amend. 14.

8. Conspiracy ⇐7.5

Not every conceivable class of persons is covered by civil rights conspiracy statute; members of plaintiff class must share some common characteristic beyond simply being victims of defendant's conspiratorial conduct and class can not be so large and amorphous that its members are virtually indistinguishable from vast majority of the populace. 42 U.S.C.A. § 1985(3).

9. Conspiracy ⇐7.5

Plaintiffs, nonunion employer and its nonunion employees who alleged injury resulting from conspiracy motivated by defendants' hostility toward nonunion workers and employers who hired them, constituted a class for purposes of civil rights conspiracy statute. 42 U.S.C.A. § 1985(3); National Labor Relations Act, §§ 7, 8, 8(b)(1) as amended 29 U.S.C.A. §§ 157, 158, 158(b)(1).

10. Conspiracy ⇐7.5

Civil rights conspiracy statute cannot be invoked to disrupt operation of a carefully integrated statutory scheme. 42 U.S. C.A. § 1985(3).

11. Conspiracy ⇐7.5

Cause of action under civil rights conspiracy statute cannot be predicated upon an unfair labor practice, without more. 42 U.S.C.A. § 1985(3).

12. Conspiracy ⇐7.5

Neither unionism nor nonunionism suffices to create a covered class for purposes of civil rights conspiracy statute; however, where there is no campaign to organize employees and force or violence is used to stake out one group's territorial claim and to deprive other workers and their employer to freely associate with one another, an

action under civil rights conspiracy statute will lie. 42 U.S.C.A. § 1985(3).

13. Commerce ⇐74.65

Commerce clause justified application of civil rights conspiracy statute to defendants' wholly private conspiracy, which was motivated by hostility against nonunion employees and their employer which employer was general contractor which, during year preceding violent attack on its construction site had performed work outside of Texas valued in excess of $300,000, where employer had purchased over $50,000 worth of goods, and materials which originated outside of Texas and where construction contract was with United States Army Corps of Engineers, even though volume of business done outside Texas was small compared to total amount of services and goods in interstate commerce. 42 U.S.C.A. § 1985(3); U.S.C.A.Const.Art. 1, § 8, cl. 3.

14. Commerce ⇐7(2)

Grant of power under commerce clause extends to those activities intrastate which so affect interstate commerce, or exertion of the power over it, as to make regulation of them appropriate means to attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. U.S.C.A.Const.Art. 1, § 8, cl. 3.

15. Labor Relations ⇐766

While Norris-LaGuardia Act requires clear and convincing evidence as to union authorization, participation in, or ratification of the act allegedly performed by its members in order to pose liability for it, it does not prescribe a different standard of proof for other issues in actions against a union or its officers or members involved in a labor dispute. Norris-LaGuardia Act, § 6, 29 U.S.C.A. § 106.

16. Labor Relations ⇐766

Where a labor organization purposefully adopts violence as its course and where that violence is not associated with or happening to result from any ongoing legitimate union conduct, union is not participating in a labor dispute within meaning of Norris-LaGuardia Act. Norris-LaGuardia Act, § 13(c), 29 U.S.C.A. § 113(c).

17. Labor Relations ⇐766

Violence at construction site, which was conceived in reprisal for refusal of employer and his workers to accede to demands that construction project be conducted as a union job, did not occur in conjunction with the labor dispute within meaning of Norris-LaGuardia Act; thus, section of Act requiring clear, unequivocal and convincing proof of union involvement in unlawful conduct in order to impose liability for it was not applicable suit brought by employer and his workers against trades council, its unions, and individual union members. Norris-LaGuardia Act, §§ 6, 13(c), 29 U.S.C.A. §§ 106, 113(c).

18. Labor Relations ⇐766

A labor dispute exists for purposes of Norris-LaGuardia Act where unlawful conduct occurs in conjunction with some legitimate union activity and a labor dispute may also exist even though the otherwise legitimate union conduct is unlawful under some other statutory scheme. Norris-LaGuardia Act, § 13(c), 29 U.S.C.A. § 113(c).

19. Federal Courts ⇐853

A finding is "clearly erroneous" when although there is evidence to support it, reviewing court on entire evidence is left with definite and firm conviction that a mistake has been committed. Fed.Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.

20. Federal Courts ⇐848

Appellate court must be especially reluctant to disregard a factual finding based upon evaluation of testimony that draws credibility into question and it may not consider the evidence anew and merely because it might have reached a different result on same evidence will not justify its setting the district court's findings aside. Fed.Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.

21. Conspiracy ⇐19

Federal Courts ⇐865

Findings that certain unions authorized or participated in conspiracy aimed at intimidating and coercing nonunion workers from working or being employed within a "union area" were not clearly erroneous; however, evidence of participation in the conspiracy was insufficient to warrant judgment against the remaining eight unions. 42 U.S.C.A. § 1985(3).

Appeals from the United States District Court for the Eastern District of Texas.

Before GODBOLD, Chief Judge, BROWN, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A. CLARK, WILLIAMS and GARWOOD, Circuit Judges.

CHARLES CLARK, Circuit Judge:

This appeal presents important questions concerning the scope of relief available under 42 U.S.C. § 1985(3), the extent of congressional power to enact a civil remedy for wholly private infringement of constitutional rights, and the relationship between section 1985(3) and the labor relations laws. The district court, 461 F.Supp. 224, issued a permanent injunction against the defendants, including numerous labor organizations. It also awarded money damages for violations of section 1985(3), concluding that the statute afforded a remedy for the kind of private conspiracy involved here and that Congress was constitutionally empowered to provide such a remedy. A panel of this court affirmed in part and reversed in part. 5th Cir., 640 F.2d 708. After rehearing, the court en banc affirms the district court in part and reverses in part.

I. THE FACTUAL BACKGROUND

This case arises out of an episode of mob violence that occurred in the early morning hours of January 17, 1975. The plaintiffs are A.A. Cross Construction Company, Inc., and two of its employees, Paul Scott and James Matthews. The defendants include the Sabine Area Building and Construction Trades Council, a loose confederation of craft and construction unions located in the Port Arthur, Texas, area. Also named as defendants are twenty-five of the Council's member unions and several individual members of some of these labor unions. The individual defendants are not parties to this appeal. The plaintiffs contend that the defendants conspired for the purpose of depriving them of the equal protection of the laws and equal privileges and immunities under the law when they planned and executed an attack on the Cross construction site, assaulting workers and destroying property.

A.A. Cross Construction Company is a Texas corporation engaged in the building and construction industry as a general contractor. In May, 1974, Cross contracted

with the Department of the Army, United States Corps of Engineers to erect the Alligator Bayou Pumping Station and Gravity Drainage Structure on the hurricane levee along Taylor's Bayou near Port Arthur. The agreement had a contract price in excess of $8 million and called for the construction of the pump station with four pumps and a gravity drain for flood control. In accordance with its customary practice, the Cross Construction Company hired its workers for the Alligator Bayou project without regard to union affiliation, employing persons solely on the basis of its own need for the applicant's occupational skills. Cross did not have a collective bargaining agreement with any labor union, and when this incident occurred no union was seeking to organize the company's employees. In addition, Cross often hired workers from outside the Port Arthur community.

Cross Construction Company's hiring practices provoked an antipathetic response from some segments of the Port Arthur community. In fact, on several occasions prior to the eruption of violence on January 17, popular enmity had risen to the level of warnings and threats directed against Cross and its employees. Local residents had confronted Cross employees at a local tavern and pool hall frequented by them, threatening to place pickets at the construction site, promising to make Cross "go union," and occasionally warning of trouble if Cross did not cease hiring nonunion laborers. About three months before the January 17 attack, one of the individual defendants, Bill Moore, approached Mr. Cross and threatened that he would "hurt you bad," saying, "What is going to happen when that big rig of yours down there burns up?" On another occasion, John Wallace, financial secretary and business representative for the Carpenters Local # 610, had told Cross that "this is union country" and that if he persisted in using nonunion labor it was "going to cost you a million dollars."

Meanwhile, during the months preceding the January 17 violence, rumors began to develop concerning a "citizens protest" to be staged at the Alligator Bayou construction site. These rumors contemplated a public demonstration to call attention to the fact that Cross hired nonunion labor and did not have a labor contract with any union as well as to protest the company's policy of hiring employees from outside the Port Arthur community.

There is no direct evidence to show the organizing force behind this protest demonstration, but on Wednesday, January 15, two days before the assault on the Cross jobsite, the Sabine Area Building Trades Council held its regular weekly meeting. Cross Construction Company's indifference to prospective employees' union status and its lack of a union contract had long been topics of concern at the Council's meetings, and they were once again discussed during the January 15 session. In addition, the group discussed the rumored citizens protest, and some of the union representatives in attendance informed the Council that the demonstration had apparently been scheduled for the following Friday.

On Thursday, the sixteenth, Cross Construction Company learned of the scheduled protest from two union employees associated with the Alligator Bayou project. Fred Dukes, a member of Cement Masons Local 884, worked for Cross as a cement finisher on a two-day job. Earl Stevens, a member of Plumbers Local 504, worked as a foreman for Cross Construction Company's mechanical subcontractor. Both men received warnings from their respective union business agents about a possible picket or dem-

onstration to be held at the Cross construction site, and both men passed that information along to Cross. Neither Dukes nor Stevens had heard anything about violent or destructive conduct. Nevertheless, Cross directed its employees to report for work at 6:00 a. m. on Friday, an hour earlier than usual, in order to avoid any confrontation between them and the demonstrators.

On the morning of January 17, after most of the Cross employees had arrived at work, a crowd of nearly three hundred people assembled at the main access road leading to the Cross construction site. Several vehicles made brief forays up the access road, and their occupants confirmed with Cross and Scott that they were at the Cross Construction Company jobsite. The crowd began to get unruly, pushing and shoving the remaining Cross workers as they arrived. Nevertheless Cross's employees began work as usual. Then, shortly after 7:00 that morning, a group of four pickup trucks, each carrying between twelve and eighteen persons, emerged from the crowd gathered at the access road and drove onto the jobsite. Plaintiff Scott went out to meet the intruders and to request them to leave the area, but one of them approached Scott and said, "Man, you all have got to be crazy . . . this is a union town." Scott told his interlocutor that they did not want any trouble, and he attempted to gather together the other employees and to leave the jobsite. However, before he could complete his mission, someone stepped out of the group and struck him on the head. Suddenly, the mob swarmed over the construction site, brutally beating Cross and his employees with iron rods and wooden boards, overturning and setting fire to the trailer that served as the construction site office, smashing automobile and truck windshields, and vandalizing company tools and equipment. The entire episode lasted only a few minutes, but the destruction was devastating. Cross and his employees were treated for their injuries at a local hospital, and work at the construction site did not resume for nearly three weeks. Some of Cross's employees, frightened by the possibility of repeated attacks at the jobsite, refused to return to work. In addition, the violence and vandalism delayed the completion of the project by about six months, ultimately causing the Cross Construction Company to default in its contractual obligation to the U.S. Army Corps of Engineers.

On January 31, 1975, plaintiffs Scott and Matthews initiated this lawsuit against the individual defendants. They sought and obtained a temporary injunction restraining the then-named defendants and "all persons, firms, and associations combining or conspiring with defendants" from further violent, intimidating, or destructive acts against employees at the Alligator Bayou Pump Station project. Nearly two years later, the plaintiffs amended their complaint, adding A.A. Cross Construction Company, Inc., as plaintiff and the Sabine Area Building and Construction Trades Council along with twenty-five local unions as defendants. The district court found that the plaintiffs had proved a conspiracy to deprive them of the equal protection of the laws, permanently enjoined the building trades council and twenty-four of the unions from future misconduct, and assessed damages against eleven of the union defendants.[1]

1. The district court assessed damages against the following eleven unions: Laborers International Union of North America, Local 870; Operative Plasters and Cement Masons International Association, Local 884; United Association of Journeymen and Apprentices of the

II. THE JURISDICTIONAL QUESTION: INJUNCTIVE RELIEF AND THE NORRIS–LAGUARDIA ACT

[1] The district court issued a permanent injunction against the Sabine Area Building and Construction Trades Council, twenty-four of its member unions, and all persons conspiring with them. The court's injunction ordered that those parties subject to its terms

> . . . shall not hereafter combine, conspire, threaten, intimidate, assault, or commit any act of violence toward or upon any person, property or possession of any person or his family who may work upon, travel to, deliver materials, goods, or services to A.A. Cross Construction Co., Inc., or to the site of the Alligator Bayou Pump Station on Taylor's Bayou near Port Arthur, Jefferson County, Texas.

The defendants contest the district court's power to issue such an injunction, arguing that the Norris-LaGuardia Act deprives the district court of jurisdiction to enjoin labor organizations from engaging in conspiratorial conduct. They maintain that the unembellished language of the Act is sufficient to show the court's usurpation of authority.

We disagree. The Norris-LaGuardia Act was passed for the purpose of limiting the circumstances and conditions under which injunctive action could be taken against labor organizations in the context of a labor dispute. The labor injunction had been an important device used by employers to counter organized labor's most effective economic weapons, strikes, boycotts, and picket lines. However, the Act was predicated on the conviction that labor disputes turned on issues of social and economic policy that could not appropriately be resolved by the courts. The legislative solution to the problems confronting workers in a complex industrial economy was union organization and collective bargaining. Since the ready issuance of labor injunctions presented a serious obstacle to the concerted activities of organized workers, Congress decided to remove the federal judiciary from labor disputes. Thus, section 5 of the Act, 29 U.S.C. § 105, limits the equitable power of the federal courts in the following way:

> No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title.

29 U.S.C. § 105.

[2] But the Act does not impose an unqualified prohibition against federal injunctive relief. Section 105 merely restricts the court's power to enjoin concerted or conspiratorial activity where the conduct to be enjoined is an act enumerated in section

Plumbing and Pipefitting Industry of the United States and Canada, Local 195; United Brotherhood of Carpenters and Joiners of America, Local 610; United Brotherhood of Carpenters and Joiners of America, Local 753; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL–CIO, Local 587; International Association of Bridge Structural and Ornamental Ironworkers, Local 125; Sheet Metal Workers International Association, Local 196; Carpenters District Council of Sabine Area; International Brotherhood of Electrical Workers, Local 479; and International Union of Operating Engineers, Hoisting and Portable Engineers, AFL–CIO, Local 450.

104.[2] The enumerated acts include refusing to work, joining a labor organization, paying or withholding strike benefits from a labor disputant, *lawfully* giving aid to a labor disputant who is prosecuting or defending a court action, truthfully and peacefully publicizing a labor dispute, peaceably assembling to promote one's interests in a labor dispute, and agreeing with or inducing other persons to do any of those acts. In short, section 104 interdicts injunctive relief against legitimate activities of labor unions. Nothing in this provision, however, denies to federal courts the power to enjoin violence, breaches of the peace, or criminal acts simply because they may be committed by persons seeking to forward or interested in some labor-related objective.

In fact, the Norris-LaGuardia Act itself recognizes by negation the threatened commission of violent acts as a condition under which an injunction may issue: Section 107 states that no court of the United States has jurisdiction to grant an injunction, unless, after a hearing, the court finds "[t]hat unlawful acts have been threatened and will be committed unless restrained . . . ." 29 U.S.C. § 107(a). Thus, violence, intimidation, threats, vandalism and combinations or conspiracies to commit such acts may be restrained and enjoined even though they arise in connection with a labor dispute. *See, e.g., Westinghouse Broadcasting Co. v. Dukakis*, 412 F.Supp. 580 (D.Mass.1976); *Potomac Electric Power Co. v. Congress of Racial Equality*, 209 F.Supp. 559 (D.D.C. 1962). The Norris-LaGuardia Act does not divest the district court of jurisdiction to enjoin the kind of violent conduct present in this case.[3]

2. Section 104 provides as follows:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
>
> (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
>
> (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

29 U.S.C. § 104.

3. Even where jurisdiction to grant injunctive relief is authorized, the Norris-LaGuardia Act imposes strict procedural requirements upon the court. *See* 29 U.S.C. §§ 107–109; *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 561–62, 58 S.Ct. 703, 707, 82 L.Ed. 1012, 1016 (1938). Section 107 provides that no federal court shall have jurisdiction to issue a "permanent injunction in any case involving or growing out of a labor dispute" except after hearing testimony in open court and after mak-

III. THE STATUTORY QUESTION: THE SCOPE OF REMEDY UNDER 42 U.S.C. § 1985(3)

A. *Griffin v. Breckenridge*

Section 1985(3) was originally enacted by Congress as a part of the Ku Klux Klan Act in order to enforce the Civil War amendments to the Constitution and to provide a means of redress for persons victimized by the Klan's acts of terror and intimidation. The statute imposes civil liability on persons conspiring to deprive another person or class of persons of "the equal protection of the laws, or of equal privileges and immunities under the laws."[4] Narrow judicial construction made section 1985(3) a seldom-used remedy during the first century after its enactment. *See, e.g., Collins v. Hardyman*, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253 (1951). However, the Supreme Court decided in 1971 to "accord to the words of the statute their apparent meaning" and held section 1985(3) provided a civil remedy for damages against wholly private infringements of constitutionally protected rights. *Griffin v. Breckenridge*, 403 U.S. 88, 97, 91 S.Ct. 1790, 1795, 29 L.Ed.2d 338, 345 (1971). In *Griffin*, a group of whites assaulted three black men along a Mississippi highway in the mistaken belief that their victims were the associates of a civil rights worker. The blacks brought an action under section 1985(3) to redress violations of the laws of the United States and of Mississippi, including the rights of free speech, assembly, association, interstate travel, liberty, and security of their persons. The Supreme Court first held that the text of

ing certain findings of fact. The district court must find: i) that the danger to the complainant is imminent; ii) that the defendant's acts will result in irreparable injury; iii) that, as to each item of relief sought, the harm to the complainant if relief were denied outweighs the harm to the defendant if relief were granted; iv) that there is no adequate remedy at law; and v) that the officials charged with protecting the complainant are either unwilling or unable to do so. *See* 29 U.S.C. § 107.

The district court in the case at bar issued a permanent injunction without specifically making these five findings; however, the defendants have not objected to the district court's failure to do so. Although this court will normally not consider an issue which a party fails to raise on appeal, a federal court is under an independent obligation to determine whether it has jurisdiction to decide a claim. *See Pettinelli v. Danzig*, 644 F.2d 1160, 1161 (5th Cir. 1981). Because the findings required by section 107 are arguably a jurisdictional prerequisite to the issuance of an injunction in a labor dispute, the defendant's failure to raise this question on appeal does not dispose of the issue. We need not decide, however, whether the district court's failure to make the requisite findings deprived it of jurisdiction. Even assuming that these findings are a jurisdictional prerequisite to the issuance of an injunction, they are required only in cases "involving or growing out of a labor dispute." As we discuss below, this case does not involve a labor dispute within the meaning of the Norris-LaGuardia Act. Thus, the absence of a labor dispute renders an inquiry into the jurisdictional nature of the section 107 findings unnecessary.

4. The relevant part of section 1985(3) reads as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3).

the statute, recent judicial interpretations given to related civil rights provisions, the complementary relationship of the various civil rights statutes, and the legislative history surrounding section 1985(3) all "point unwaveringly to § 1985(3)'s coverage of private conspiracies." 403 U.S. at 101, 91 S.Ct. at 1798, 29 L.Ed.2d at 347.

While eliminating the state action requirement, the *Griffin* court recognized that the statute, if applied too broadly, could displace many areas of tort law that have traditionally been reserved to the states and thereby violate constitutionally based principles of federalism. "That the statute was meant to reach private action does not . . . mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others." 403 U.S. at 101, 91 S.Ct. at 1798, 29 L.Ed.2d at 347. The Court delineated the reach of the statute by giving full effect to a limiting amendment drafted by Congress. The Court construed the language of the amendment, which limited section 1985(3)'s application to deprivations of equal protection or equal privileges and immunities, to require that there be some "class-based, invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 102, 91 S.Ct. at 1798. *Griffin* thus made clear that the limiting principle adopted by Congress is satisfied by a showing of class-based animus. The Court then noted four elements necessary for a plaintiff to establish a 1985(3) cause of action:

(1) the defendants must conspire or go in disguise on the highway or premises of another;

(2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and

(3) one or more of the conspirators must commit some act in furtherance of the conspiracy; whereby

(4) another is either (a) injured in his person or property or (b) deprived of having and exercising any right or privilege of a citizen of the United States.

See id. at 102–03, 91 S.Ct. at 1790, 29 L.Ed.2d at 348. Subsequently, this court has added a fifth element,

(5) that the conspirators' conduct must be unlawful independent of the section 1985(3) violation.

See McLellan v. Mississippi Power & Light Co., 545 F.2d 919 (5th Cir. 1977) (en banc).

The *Griffin* court, having concluded that the plaintiffs had stated a cause of action under section 1985(3), then sought to locate a source of congressional power to reach the private conspiracy alleged. The sources identified in *Griffin* were the Thirteenth Amendment and the constitutional right to travel. 403 U.S. at 104–06, 91 S.Ct. at 1799–1800, 29 L.Ed.2d at 349–50. The Court observed, however, that other provisions of the Constitution, including section 5 of the Fourteenth Amendment, might empower Congress to reach other conspiracies by private persons. *Id.* at 107, 91 S.Ct. at 1801, 29 L.Ed.2d at 351. However, the Court found the facts of that case made it unnecessary to look beyond the Thirteenth Amendment and the right to interstate travel.

B. *The Present Case*

[3] *Griffin's* principles indicate the plaintiffs here have made out a cause of action under section 1985(3). The facts of this case clearly embody four of the five elements essential to a successful 1985(3) claim. First, the evidence is sufficient to

establish a conspiracy among some of the Council's constituent unions and individual defendants. Second, proof that plaintiffs were assaulted, beaten, and threatened and that property was destroyed establishes the requisite "act in furtherance" of the conspiracy. Third, these acts are indisputably illegal apart from § 1983(3) as required by *McLellan*. Fourth, there is evidence of personal injuries, property damage, and economic loss. The only element requiring analysis is the requirement that the conspiracy be for the purpose of depriving a person of the equal protection of the laws or equal privileges and immunities under the laws. This requirement, in turn, has two components: (1) the violation of some protected right and (2) a class-based, invidiously discriminatory animus motivating the violation.

1. *Violation of a Protected Right*

In *Griffin*, the Supreme Court stated that a 1985(3) conspiracy "must aim at a deprivation of the equal enjoyment of rights secured by the law to all." 403 U.S. at 102, 91 S.Ct. at 1798, 29 L.Ed.2d at 348. The plaintiffs in the case at bar contend that the object of the defendants' conspiracy was to deprive them of their First Amendment right to associate with their fellow nonunion employees. They argue that curtailment of their interests secured by the First Amendment is a deprivation of equal protection of the laws within the meaning of section 1985(3) as interpreted by *Griffin*.

[4, 5] The Ku Klux Klan Act was originally entitled, "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes." 17 Stat. 13 (1871). The guaranties afforded by the First Amendment are protected by the due process clause of the Fourteenth Amendment. *E.g. Williams v. Rhodes*, 393 U.S. 23, 30–31, 89 S.Ct. 5, 10, 21 L.Ed.2d 24, 31 (1968); *New York Times v. Sullivan*, 376 U.S. 254, 276–77, 84 S.Ct. 710, 724, 11 L.Ed.2d 686, 709 (1964); *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 1217 (1940); *De Jonge v. Oregon*, 299 U.S. 353, 364, 57 S.Ct. 255, 260, 81 L.Ed. 278, 283 (1937). Moreover, the right of free association is closely aligned with the right of free speech and is similarly protected by the First Amendment. *E.g., Abood v. Detroit Board of Education*, 431 U.S. 209, 233, 97 S.Ct. 1782, 1798–99, 52 L.Ed.2d 261, 283 (1977); *Healy v. James*, 408 U.S. 169, 181, 92 S.Ct. 2338, 2346, 33 L.Ed.2d 266, 279 (1972); *Baird v. State Bar of Arizona*, 401 U.S. 1, 6, 91 S.Ct. 702, 705, 27 L.Ed.2d 639, 646 (1971); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462, 78 S.Ct. 1163, 1171–72, 2 L.Ed.2d 1488, 1499 (1958).

The defendants raise two objections to the plaintiffs' assertion of a protected right. First, they contend that section 1985(3) does not provide a remedy for private interference with First Amendment freedoms. Second, they argue that even if such a remedy does exist, the plaintiff's activities did not rise to the level of a constitutionally protected right.

[6] In arguing that section 1985(3) does not protect against private infringement on First Amendment freedoms, the defendants note the well-established principle that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161, 1180 (1948). To support their construction of section 1985(3) the defendants rely upon several decisions of the Seventh Circuit. In *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972), the court held

that section 1985(3) does not afford protection against private deprivations of rights protected under the Fourteenth Amendment absent some kind of state involvement. Emphasizing the historical connection between sections 1983 and 1985(3), *Dowling* decided that it is necessary to identify the interests which Congress intended to protect from unequal treatment as well as the kinds of conduct which it meant to proscribe.

> The breadth of the statute's coverage is yet to be determined, but three categories of protected rights have been plainly identified. *Griffin* gives express recognition to a black citizen's Thirteenth Amendment rights and to his federal right to travel interstate; the title of the statute expressly identifies the third category, namely, rights protected by the Fourteenth Amendment. We think the § 1983 cases make it clear that in this third category a "state involvement" requirement must survive *Griffin*.

459 F.2d at 195 (footnotes omitted).[5] The Seventh Circuit subsequently extended the *Dowling* rationale in *Murphy v. Mount Carmel High School*, 543 F.2d 1189 (7th Cir. 1976), expressly holding that section 1985(3) provides no remedy for purely private impairment of First Amendment speech and associational freedoms. *Accord Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (4th Cir. 1974).

To explain how private conspirators could deprive a person of rights which are only protected against state interference, Justice Stevens, the author of *Dowling*, later suggested that "if private persons take conspiratorial action that prevents or hinders the constituted authorities of any State from giving or securing equal treatment, the private persons would cause those authorities to violate the Fourteenth Amendment." *See Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366, 384, 99 S.Ct. 2345, 2355, 60 L.Ed.2d 957 (1979) (Stevens, J. concurring).

Our problem with this line of analysis arises from the Supreme Court's express reasoning in *Griffin*. Because most basic constitutional provisions impose limitations on the power of government to regulate private conduct, the rights these limitations confer on individuals are typically rights against the state. The *Griffin* Court acknowledged the conceptual difficulties associated with private deprivations of constitutional rights. The Court, however, construed section 1985(3) to reach both public and private constitutional wrongs.

> A century of Fourteenth Amendment adjudication has . . . made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons. Yet there is nothing inherent in the phrase that requires the action working the deprivation to come from the State. Indeed, the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in § 1985(3) of *all* deprivations of "equal protection of the laws" and "equal privileges and immunities under the laws," *whatever their source*.

403 U.S. at 97, 91 S.Ct. at 1796, 29 L.Ed.2d at 345 (citation omitted and some emphasis

5. *Dowling* recognizes that there is no statutory requirement of state participation or support for the conduct of the conspirators, *i.e.*, that there is no requirement that the defendants act under color of state law. However, where one suffers a deprivation of a federally created right which necessarily includes some component of state action, *Dowling* holds that such state action is also a necessary ingredient of the section 1985(3) cause of action. *See* 459 F.2d at 194–95.

supplied). The Court also said: "It is thus evident that all indicators—text, companion provisions, and legislative history—point unwaveringly to § 1985(3)'s coverage of private conspiracies." *Id.* at 101, 91 S.Ct. at 1798, 29 L.Ed.2d at 347.[6] These clear, decisional words in *Griffin* simply will not permit us to speculate that section 1985(3) might not afford a remedy for private conspiracies.

Griffin even considered and rejected the very explanation of section 1985(3) which was later suggested in the *Novotny* concurrence. In concluding that the first part of section 1985(3) reached all deprivations of the equal protection of the law, "whatever their source," *Griffin* considered the various forms which a state action limitation might take but rejected the idea that Congress had intended to impose any state action limitation on section 1985(3). Specifically, the Court rejected the notion that a private conspiracy had to hinder state officials in their obligation to give equal protection because it found that this type of conduct was explicitly dealt with elsewhere in the Act. *See Griffin v. Breckenridge*, 403 U.S. at 98–99, 91 S.Ct. at 1796–97.

[7] We are not unmindful of the Supreme Court's statement in *Novotny*, that section 1985(3) "provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." 442 U.S. at 372, 99 S.Ct. at 2349. We also acknowledge that some commentators have read this statement as an implicit endorsement of the Seventh Circuit's position in *Dowling*. *See* Note, *Private Conspiracies to Violate Civil Rights*, 61 B.U.L.Rev. 1007 (1981). However, so long as *Griffin* remains viable, we are bound by its determination that section 1985(3) reaches all deprivations of equal protection, whatever their source.

The second prong of defendants' argument on this point asserts that even if section 1985(3) protects first amendment rights from private infringement, the plaintiffs' actions in this case—merely working for a nonunion employer—do not qualify for constitutional protection. We disagree.

The Supreme Court has long recognized that association for the purpose of advancing economic, as well as political or religious, interests falls within the protection of the First Amendment. *See Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 8, 84 S.Ct. 1113, 1117–18, 12 L.Ed.2d 89 (1964); *Thomas v. Collins*, 323 U.S. 516, 531, 65 S.Ct. 315, 323, 89 L.Ed. 430 (1945). In *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the Court recognized that the corollary of the right to associate to advance economic interests is the right not to associate. *Abood* stated that "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests." 431 U.S. at 222, 97 S.Ct. at 1793. The Court reasoned that because the employees' forced support would entail the advancement of interests and ideas which they did not share, the employees' right not to associate could be infringed by union shop laws. Moreover, the Court pointed out that union shop laws had been upheld previously, not because employees lack a First Amendment right not to associate, but be-

6. Technically, of course, this language is dicta. *Griffin* grounded its decision on the rights secured to black citizens under the Thirteenth Amendment and the right to interstate travel, both of which operate as limits on individual conduct as well as state conduct. However, we believe that the language and reasoning of *Griffin* on this issue are sufficiently indicative of the Supreme Court's approach to be regarded as dispositive.

cause "such interference [with that right] as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Id.* Though it found such infringement justified, *Abood* thus recognized that requiring financial support could infringe first amendment rights.

The conspiracy in the case at bar sought to deny completely the plaintiff employees' right not to associate. The district court found that several truckloads of men assaulted the plaintiffs and "threatened to continue violent actions if the nonunion workers did not leave the area or concede to union policies and principles." The conspiracy was intended to deny the nonunion employees their right not to associate either by driving them out of the county or by coercing them to unionism through violence. The defendants sought not merely to force plaintiffs to give financial support to a union (an act which *Abood* recognized could interfere with a person's freedom not to associate), but also to force Cross's employees to become union members or leave an area which had been staked out as "union country." The purpose of the conspiracy was to deprive the plaintiffs of a protected right.[7]

2. *Discriminatory, Class-Based Animus*

While *Griffin* made clear that Congress intended to reach a denial of equal protection because of race, it left open the issue of whether section 1985(3) prohibited other class-based discrimination. *See* 403 U.S. at 102 n.9, 91 S.Ct. 1798 n.9. We find it does and that plaintiffs come within its protection.

In *Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340 (5th Cir. 1981) (en banc), we recently considered what other types of class-based animus section 1985(3) might reach. We found that two types of classes come within the statute's protection. First, we recognized that section 1985(3) covers classes "having common characteristics of an inherent nature"—i.e., those kinds of classes offered special protection under the equal protection clause. *Id.* at 347. We also recognized that:

> [t]he class-based animus required by the Supreme Court in *Griffin* and now reasserted by this court is not identical with the class-based distinctions required to support an action under the equal protection clause .... For example, section 1985 was certainly intended to cover conspiracies against Republicans; distinctions based on affiliation with a major political party are not among those traditionally subject to special scrutiny under the Fourteenth Amendment. What *Griffin* stands for, and what we now hold, is that Section 1985 was intended to encompass only those conspiracies motivated by animus against the kinds of classes Congress was trying to protect when it enacted the Ku Klux Klan Act.

Id. at 347 n.9.

Kimble is consistent with the decisions of the other circuits. Decisions which have

7. Because of our disposition of the case, it is not necessary to decide whether section 1985(3) also protects against private conspiracies to deny rights secured under state law. *See Life Insurance Company of North America v. Reichardt*, 591 F.2d 499 (9th Cir. 1979) (holding violations of state antidiscrimination statute cognizable). It is also unnecessary to decide whether federal statutory rights are protected by § 1985(3). *See Novotny v. Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235 (3d Cir. 1978), *rev'd*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979) (violations of Title VII). *Cf. McLellan*, 545 F.2d 919 (5th Cir. 1977) (right to file bankruptcy petition not protected.)

accorded protection to nonracial classes have generally fallen into the two categories identified by *Kimble*. The first category consists of those classes afforded special protection under the equal protection clause. *See, e.g., Ward v. Connor*, 657 F.2d 45 (4th Cir. 1981), *cert. denied*, — U.S. —, 102 S.Ct. 1253, 71 L.Ed.2d 445 (1982) (members of Unification Church); *Life Insurance Company of North America v. Reichardt*, 591 F.2d 499 (9th Cir. 1979) (women); *Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973) (Jews); *Baer v. Baer*, 450 F.Supp. 481 (N.D.Cal.1978) (members of the Unification Church); *Mandelkorn v. Patrick*, 359 F.Supp. 692 (D.D.C.1973) (Children of God). The second is made up of classes whose members are discriminated against because of their political beliefs or associations. *See, e.g., Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S. 958, 96 S.Ct. 1436, 47 L.Ed.2d 364 (1976) (supporters of a particular political candidate); *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975) (political demonstrators); *Smith v. Cherry*, 489 F.2d 1098 (7th Cir. 1973), *cert. denied*, 417 U.S. 910, 94 S.Ct. 2607, 41 L.Ed.2d 214 (1974) (voters for a sham political candidate); *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973) (supporters of incumbent sheriff); *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) (worshippers at a predominantly white Catholic church disrupted by black civil rights protesters).

Plaintiffs are not a class normally afforded special protection under the equal protection clause merely because they wish to work nonunion. They are entitled to section 1985(3) protection only if they are persons within the second category of protected classes noted by *Kimble*, "the kind[ ] of class Congress was trying to protect when it enacted the Ku Klux Klan Act." 648 F.2d at 347 n.9. In considering whether plaintiffs qualify, we must from the outset be mindful that the conspiracy in this case was motivated by a prounion animus so strong that it staked its claim not merely ideologically, but geographically. The nonunion plaintiffs were repeatedly told that they were in union country and would be punished for choosing to work there nonunion.

[8] Not every conceivable class of persons is covered by section 1985(3). Members of the plaintiff class must share some common characteristic beyond simply being victims of the defendant's conspiratorial conduct. *See, e.g., Askew v. Bloemker*, 548 F.2d 673 (7th Cir. 1976) (homeowners raided by drug enforcement agents); *Harrison v. Brooks*, 519 F.2d 1358 (1st Cir. 1975) (property owners allegedly injured by city council rezoning efforts). The class cannot be so large and amorphous that its members are virtually indistinguishable from the vast majority of the populace. *See, e.g., Blevins v. Ford*, 572 F.2d 1336 (9th Cir. 1978) (nonlawyers). Even some clearly defined and easily identifiable groups have been denied protected status under the statute. *See, e.g., DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (homosexuals); *Carchman v. Korman Corp.*, 594 F.2d 354 (3d Cir. 1979), *cert. denied*, 444 U.S. 898, 100 S.Ct. 205, 62 L.Ed.2d 133 (1979) (tenant organizers); *Lessman v. McCormick*, 591 F.2d 605 (10th Cir. 1979) (debtors); *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (en banc) (persons who file voluntary bankruptcy petitions); *Bricker v. Crane*, 468 F.2d 1228 (1st Cir. 1972), *cert. denied*, 410 U.S. 930, 93 S.Ct. 1368, 35 L.Ed.2d 592 (1973) (physicians who testify in malpractice suits).

In the absence of Supreme Court guidance as to the kinds of classes protected by section 1985(3) or a method by which protected classes should be identified, we turn to our own en banc decision in *McLellan* to provide our gauge. In *McLellan*, we held that the statute does not cover persons who file voluntary petitions in bankruptcy. The decision was based on three factors. First, the legislative history of the Ku Klux Klan Act contains no evidence of congressional concern about discrimination against persons who become insolvent. Second, while the protection afforded by the civil rights acts is not static, it would be inappropriate to enlarge the group of protected classes to include bankrupts when Congress had specifically declined to prohibit discrimination against them. Third, including bankrupts within the ambit of section 1985(3) would be unwarranted in light of the Supreme Court's refusal to characterize the right to file a bankruptcy petition as a fundamental right. 545 F.2d at 932-33. While the presence of the first factor indicates that a particular class should come under the aegis of section 1985(3), the last two factors act more as checks on unwarranted expansion of section 1985(3). Their presence does not suggest so much that a particular class should be protected as their absence indicates that coverage would be inappropriate.

[9] Applying the *McLellan* factors to our case today, we find that the plaintiffs constitute a class for 1985(3) purposes.[8] The labor union movement in America was yet to be born when the 42d Congress was in session, so it could not have been specifically concerned with discrimination perpetrated against nonunion laborers. However, the congressional debates evince a hearty regard for persons who are victimized because of their political beliefs and associations. Today's Ku Klux Klan proclaims itself to be a racist organization. But in 1871 it was regarded primarily as a political one. The motives and ambitions of the Klan disturbed the Republicans in the 42d Congress because they feared that its activities would defeat the policies of Reconstruction and deprive the newly emancipated blacks of rights secured to them under the recent amendments to the Constitution. Senator John Sherman of Ohio voiced this concern after he read aloud from a copy of the Klan's secret oath,

> showing that here is a political organization, with political ends, political aims; it shows that the object and intent of that political organization is to prevent large masses of the people of the southern States from enjoying a right which has been guaranteed to them by the Constitution of our country.

Cong. Globe, 42d Cong., 1st Sess. 153 (1971). The Klan's political objective formed a recurrent theme in the Senate debates.[9]

The apprehension of Republican senators over the Klan's scheme of terrorizing citi-

8. Our reliance upon the factors deemed relevant in *McLellan* does not necessarily imply that they are the only relevant considerations. Conceivably, other factors may be regarded as sufficient to include or to exclude other classes from § 1985(3) coverage.

9. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. 252 (remarks of Sen. Morton) ("[t]he purpose [of the Klan] is by these innumerable and nameless crimes to drive those who are supporting the Republican party to abandon their political faith or to flee the State."); *id.* at 504 (remarks of Sen. Pratt) (the primary purpose of the Klan "is to punish men for their political opinions"); *id.* at 702 (remarks of Sen. Edmunds) (the "systematic plan [of the Klan] is not to leave in any of those States a brave white man who dares to be a Republican or a colored man who dares to be a voter").

zens for their political views and of preventing voters from exercising their franchise also echoed throughout the debates conducted in the House. Representative Ellis Roberts of New York expressed this concern in the following terms:

> But one rule never fails: the victims whose property is destroyed, whose persons are mutilated, whose lives are sacrificed, are always Republicans. They may be black or white; they include those who wore the blue and those who wore the gray; newcomers and life-long residents, but only Republicans. Stain the door lintels with the mark of opposition to reconstruction and of hostility to the national Administration and the destroying angel passes by. Omit that sign and the torch may kindle the roof that covers women and children.... Such uniformity of result can come only from design. Republicans only are beaten and mutilated and murdered, because the blows are aimed at Republicans only.

Cong. Globe, 42d Cong., 1st Sess. 412–13 (1871). Other Republican congressmen expressed similar views.[10] *See generally* Comment, *A Construction of Section 1985(c) in Light of its Original Purpose*, 46 U.Chi.L. Rev. 402, 407–420 (1979).

These attacks on Republicans prompted congressional concern because they were viewed as more than isolated or chance occurrences. Congress saw them as part of a pervasive campaign to prevent Republicans from establishing the policies of Reconstruction in an area of the nation—the South. *See* Avins, *The Ku Klux Klan Act of 1871*, 11 St. Louis U.L.J. 331, 376 (1967). The Congressmen consistently noted the pervasive regional hostility toward the Republicans as a reason for extending federal protection in section 1985(3). *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. 333–34 (1871) (remarks of Rep. Hoar); *id.* at 412–13 (remarks of Rep. Roberts.)[11]

Although Congress did not express a specific intent to protect nonunion employees in enacting the Ku Klux Klan Act, the legislative history demonstrates that the nonunion employees in this case comprised

10. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. 72 (remarks of Rep. Blair) (the Klansmen "murder for a difference in political opinions"); *id.* at 333 (remarks of Rep. Hoar) (the Klan is a "secret political conspiracy"), *id.* at 391 (remarks of Rep. Elliott) ("the design of the Ku Klux is political"); *id.* at 488 (remarks of Rep. Lansing) ("the Ku Klux in their crimes are inspired by political zeal").

11. The plaintiffs argue that Congress also intended to extend protection to workers. They note particularly Senator Freylinghausen's concern for the rights of northern laborers migrating south:

> The journeyman cobbler of New England may wrap his awl and wax and last in his leather apron and stand in Charleston, or New Orleans, or Savannah, and say "Here I will settle in despite of the constitution and of the laws of these States; and I have a right to invoke the power of the nation here to protect me." The mason or carpenter of New Jersey may put his chisels or his trowels in his carpet-bag, and go to any part of this land and say, "Here I will stay in despite of the holy horror of those who cry out," "Adventurer!" "Scalawag!" "Carpet-bagger!"

Cong. Globe, 42d Cong., 1st Sess. 500 (1871). Although this, and other remarks noted by the plaintiffs, do express Congress' intent to protect northern laborers, we discount their importance to the case at bar for two reasons. First, because these remarks occur only sporadically throughout the legislative history, they do not appear to reflect a major concern of the 42d Congress. Second, the hostility directed toward the carpetbaggers appears to have arisen because of the carpetbaggers' association with the policies of Reconstruction, not because of any economic association. Their status as workers appears to have been merely incidental to the hostility they experienced and to Congress' concern.

the kind of class Congress intended to protect. The debates over the need for protecting the Republicans in the South reveal two class characteristics which prompted Congress to extend protection in section 1985(3). First, the legislative history reflects a pervasive concern for people discriminated against because of their political associations. Second, Congress' concern was prompted by the tenuous status of Republicans in this geographic region. The Republicans' attempt to establish an extended new order had met with pervasive regional hostility. It was this regional hostility which Congress sought to counterbalance by extending federal protection in section 1985(3). Although regional hostility is not an intrinsic class characteristic, those who would exercise a false territorial sovereignty by fomenting hostility against persons antagonistic to their aims create a class in need of federal protection of precisely the sort Congress intended to protect.

In this case, the plaintiffs were attacked because of their economic, rather than their political, association. However, an animus directed against nonunion association is closely akin to animus directed against political association. Second, the position of these nonunion employees in Jefferson County, Texas, is markedly similar to that of the Republicans in the South. The presence of these nonunion employees in "union country," no less than the presence of the Republicans in the previously Democratic stronghold, ignited a pervasive regional hostility. It was this regional hostility which classified Republicans as protected. In this case, the same hostility toward nonunion employees classifies them as the kind of persons Congress intended the Ku Klux Klan Act to protect.

Similarly, acknowledging that the scope of the statute includes nonunion workers who are attacked for their choice to associate with other nonunion workers, thereby enabling an employer to offer significant work to the class, is appropriate in light of subsequently enacted federal legislation. While Congress specifically refused to prohibit discrimination against bankrupts by legislation, it expressed a desire to protect laborers who opt not to affiliate themselves with a labor organization. Section 7 of the original Wagner Act provided

> [e]mployees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Wagner Act, § 7, 49 Stat. 452 (1935).

At the time Congress passed the original Act, it rejected the argument that parity required granting protection against coercive tactics of labor organizations as well as against those committed by employers. *See* S.Rep. 573, 74th Cong., 1st Sess. 16 (1935). However, significant change was not long in coming. The 1947 Taft-Hartley amendments to the National Labor Relations Act put unfair labor practices by labor organizations in the list of condemned actions. Under the Taft-Hartley Act employees retained the right to form, join, or assist labor organizations. However, section 7 of the original Act was revised to also protect "the right to refrain from any or all such activities." Taft-Hartley Act, § 101, 61 Stat. 140 (1947), currently codified at 29 U.S.C. § 157. Section 8(b)(1) now declares it to be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed by section 7. 29 U.S.C. § 158(b)(1). By these actions Congress has

underscored the importance of the right of free association in the labor relations context and guaranteed the right to free and untrammeled choice to associate or not to associate with a labor organization. This manifestation of congressional concern for those in plaintiffs' class makes their protection by section 1985(3) particularly appropriate.

Finally, *McLellan* regarded the Supreme Court's refusal to call the right to file a bankruptcy petition a fundamental right as relevant to its own determination that bankrupts are not protected by section 1985(3). By contrast, the Supreme Court has characterized the right of free association as "a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486, 81 S.Ct. 247, 251, 5 L.Ed.2d 231, 236 (1960). Our legal system honors the freedom of the individual to associate as he chooses because that freedom "tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change." *Gilmore v. City of Montgomery*, 417 U.S. 556, 577, 94 S.Ct. 2416, 2427, 41 L.Ed.2d 304, 321 (1974). The importance of the freedom of association has led the court to call it one of the "indispensable liberties," *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488, 1499 (1958), which ranks "among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24, 31 (1968). The right of association is fundamental in our constitutional scheme of values. Thus, the difference in importance assigned to the right to file a bankruptcy petition and the right of the individual to freely associate with others of his own choosing favors protecting these plaintiffs.

Although we find that Congress intended to classify these nonunion employees as entitled to use section 1985(3) that finding does not resolve the question of whether their employer, which is not a member of the class, can assert a claim under this section. Section 1985(3) provides that "in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy whereby another is injured in his person or property, . . . the party so injured . . . may have an action for the recovery of such damages, occasioned by such injury. . . ." The language of section 1985(3) specifically provides a remedy for any person injured by an act taken in furtherance of the conspiracy. *See Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366, 390–91, 99 S.Ct. 2345, 2358, 60 L.Ed.2d 957 (1979) (White, J., dissenting) (reaching an issue not addressed by the majority). *But see Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711, 712 (9th Cir. 1981).

The district court found that Cross Construction had been injured by the attack on its Alligator Bayou worksite. There is no dispute as to the fact of the corporation's injury or that it resulted from the defendants' acts in furtherance of the conspiracy. The plain language of the statute grants the employer a right to recover for these injuries. *Cf. Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969).

The plaintiff, Cross Construction Company, was denied the equal protection of law because, in this "union country" area, it attempted to construct a government project without entering into a collective bargaining agreement to hire nonunion workers. The plaintiff class of Cross em-

ployees were denied equal protection because they dared to try to work nonunion in this place. Both employer and employee plaintiffs were attacked and beaten and their property was destroyed because union adherents put themselves above the law and used brute force to enforce their territorial claim. The actions of plaintiffs and the reaction of defendants joined to define the class and designate the persons who could claim the protection of section 1985(3). The plaintiff employees form a class of nonunion workers who have a right not to belong to a union and the plaintiff employer is a person who has been injured by a class-based invidiously discriminatory animus directed toward its workers and it.

[10–12] Our decision does not hold or imply that every union-nonunion controversy can create a section 1985(3) cause of action. Neither does it hold or imply that every instance of violence arising in the context of a dispute about employment will necessarily do so. Powerful limitations exist to restrict an overly broad application of the statute. *See generally McLellan*, 545 F.2d at 940–41 (Godbold, J., dissenting). Section 1985(3) cannot be invoked to disrupt the operation of a carefully integrated statutory scheme. *See Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979).[12] Neither can a section 1985(3) cause of action be predicated upon an unfair labor practice, without more. *Cf. United States v. DeLaurentis*, 491 F.2d 208 (2d Cir. 1974) (holding an unfair labor practice not cognizable under 18 U.S.C. § 241, the criminal analogue to section 1985(3)). Neither unionism nor nonunionism suffices to create a covered class. But where, as here, there is no campaign to organize employees and force or violence is used to stake out one group's territorial claim and to deprive other workers and their employer of the right to freely associate with one another, a section 1985(3) action will lie.[13]

12. *Novotny* held that a right created by Title VII could not be asserted under section 1985(3). To do so would allow a litigant to bypass the statutory plan, particularly the administrative process, created by Congress. *See* 442 U.S. at 375 76, 99 S.Ct. at 2350 51. Because the litigants here have not attempted to assert a right created by the National Labor Relations Act, the concerns expressed in *Novotny* are inapposite to this case.

13. It should be observed that the National Labor Relations Board has a long-established policy against awarding monetary damages for physical injury and property damage caused by strike or picket line violence for which the union is held responsible. *See* Union de Tronquistas Local 901 (Hawk Joint Pipe & Co.), 202 N.L.R.B. 399 (1973); R. Gorman, Basic Text on Labor Law 217 (1976); D. McDowell & K. Huhn, NLRB Remedies for Unfair Labor Practices 99 100 (1976). The Board's refusal to give damage awards is predicated in part upon its view that such awards would unduly interfere with the policy of the National Labor Relations Act to protect concerted activities and that other remedies against union violence are sufficient deterrent. Union de Tronquistas, 202 N.L.R.B. at 400. Its practice is also grounded in concern for the proper institutional role to be played by the Board. *See* District 1199, National Union of Hospital and Health Care Employees (Frances Scherver Home and Hospital), 345 N.L.R.B. 105 (1979) (Board is not equipped to handle personal injury claims); Union Nacional de Trabajadores, 219 N.L.R.B. 157 (1975) (awards are punitive and, therefore, not part of the Board's statutory function).

Whatever the basis for the Board's refusal to order compensation for injuries suffered during strike or picket line violence, our decision that section 1985(3) affords a remedy in this case does not offend that policy. In this case, no lawful concerted activity was taking place when the Cross construction site was attacked. There was no organizational campaign, no union demand for recognition, no informational picket, and no collective bargaining in progress. In such circumstances, a civil remedy for damages presents no danger of thwart-

IV. THE CONSTITUTIONAL QUESTION: THE SOURCE OF CONGRESSIONAL POWER

[13] Having determined that section 1985(3) was intended to provide a civil remedy for the kind of conspiracy involved here, we must respond to defendants' argument that Congress lacks the constitutional power to enact legislation of this breadth. The plaintiffs maintain that section 5 of the Fourteenth Amendment authorizes Congress to provide a civil remedy for this private conspiracy. On the particular facts before us, we hold that the Commerce Clause empowers Congress to reach defendants' conduct and do not reach the Fourteenth Amendment issue.

Griffin emphasized that it was unnecessary to test the constitutionality of section 1985(3) in all conceivable applications in order to sustain its facial constitutionality and its application to the facts of any particular case. 403 U.S. at 105, 91 S.Ct. at 1799, 29 L.Ed.2d at 350. *Griffin* also makes clear that section 1985(3) is not unconstitutional merely because it reaches wholly private conspiracies. *Griffin* does, however, indicate that a source of congressional power must be identified to warrant application of the statute in each case.

The *Griffin* court concluded that the Thirteenth Amendment and the constitutional right to interstate travel authorized Congress to reach the private conspiracy alleged there. But the court concluded its opinion, stating

> In identifying these two constitutional sources of congressional power, we do not imply the absence of any other. More specifically, the allegations of the complaint in this case have not required consideration of the scope of the power of Congress under § 5 of the Fourteenth Amendment.

Id. at 107, 91 S.Ct. at 1801, 29 L.Ed.2d at 351.

The plaintiffs' 1985(3) action cannot be sustained under the Thirteenth Amendment, for they are neither a racially oppressed group nor suffering in the bonds of involuntary servitude. *See, e.g., Jones v. Mayer*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968); *Clyatt v. United States*, 197 U.S. 207, 25 S.Ct. 429, 49 L.Ed. 726 (1905). Neither can it be supported by the right to travel on the present record. Although the plaintiffs alleged that the object of the defendants' conspiracy was to deprive them of the right to interstate travel, they have introduced no evidence to show that either the purpose or the result of the conspirators' acts was to infringe upon their right to such travel.

However, the alternative path suggested by *Griffin* is itself fraught with uncertainty. A major controversy still exists over the extent to which section 5 of the Fourteenth Amendment grants Congress the power to reach wholly private conduct. Particularly, whether section 1985(3) can be constitutionally applied to private, nonracially motivated conspiracies is a question which has divided the circuits. *Compare Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) *and Richardson v. Miller*, 446 F.2d 1247 (3d Cir. 1971) (holding that the Fourteenth Amendment authorizes Congress to reach purely private conduct) *with Murphy v. Mount Carmel High School*, 543 F.2d 1189 (7th Cir. 1976) (finding that it does

ing the Board's policy. However, whether section 1985(3) should also extend to other conspiracies against nonunion workers and their employers is a question which we expressly pretermit.

not). Furthermore, no single interpretation of the expanse of Congress's power under section 5 has consistently commanded the adherence of a majority of the Supreme Court. *Compare United States v. Guest*, 383 U.S. 745, 762, 86 S.Ct. 1170, 1180, 16 L.Ed.2d 239, 251 (1966) (Clark, J., concurring, joined by Black and Fortas, J.J.) *and id.* at 782, 86 S.Ct. at 1190, 16 L.Ed.2d at 263 (Brennan, J., concurring and dissenting, joined by Warren, C. J. and Douglas, J.) (suggesting that § 5 empowers Congress to punish purely private conspiracies to deprive Fourteenth Amendment rights), *with, id.* at 753–60, 86 S.Ct. at 1175–80, 16 L.Ed.2d at 246–50 (opinion of the Court by Stewart, J., relying on right to interstate travel) *and id.* at 762, 86 S.Ct. at 1180, 16 L.Ed.2d at 251 (Harlan, J., concurring and dissenting). *See Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970); *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966).

We need not depend on this uncertain precedent for congressional power. *Griffin* clearly contemplated that other sources of congressional power might be available to justify other applications of section 1985(3). Indeed, the original proponents of the Ku Klux Klan Act did not base their assertion of congressional power exclusively on the Fourteenth Amendment. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. 81 (1871) (remarks of Rep. Bingham) ("It was always competent for the Congress of the United States by law to enforce every affirmative grant of power . . . ."); *id.* at 477–78 (remarks of Rep. Shellabarger (referring to the amendment to § 2 "so far as it is not confined to infractions of rights which are clearly independent of the Fourteenth Amendment, referable to and sustained by the old provisions of the Constitution"). On the facts presented in this case, we hold Congress has the authority to reach a wholly private conspiracy under the commerce power conferred by article I, section 8 of the Constitution.

A.A. Cross Construction Company is a general contractor in the building and construction industry. The record indicates that during the year preceding the violent episode of January 17, 1975, Cross had performed work outside of Texas valued in excess of $300,000. During that same period, Cross purchased goods and materials which originated outside of Texas, were used in its operations within Texas, and were valued at more than $50,000. In addition, at the time of the attack on the Alligator Bayou construction site, Cross was performing its obligations under a contract with the United States Army Corps of Engineers.

[14] Article I, section 8, clause 3 of the Constitution confers upon Congress the power "[t]o regulate Commerce . . . among the several states" and clause 18 of the same article grants it the power "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . . ." As the Supreme Court has pointed out, this grant of power "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119, 62 S.Ct. 523, 526, 86 L.Ed. 726, 732 (1942). "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 464, 69 S.Ct. 714, 716, 93 L.Ed. 805,

811 (1949). *See United States v. Darby*, 312 U.S. 100, 118, 61 S.Ct. 451, 459, 85 L.Ed. 609, 619 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 57 S.Ct. 615, 624, 81 L.Ed. 893, 911 (1937). Moreover, that the volume of goods and supplies purchased by Cross or that the volume of business done outside of Texas is comparatively small in terms of the total amount of goods moved or work performed in interstate commerce is not significant. *Katzenbach v. McClung*, 379 U.S. 294, 300–01, 85 S.Ct. 377, 382, 13 L.Ed.2d 290, 291 (1964); *Wickard v. Filburn*, 317 U.S. 111, 127–28, 63 S.Ct. 82, 90, 87 L.Ed. 122, 136 (1942). Judicial inquiry is limited to asking whether Congress had "a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce. . . ." *Katzenbach v. McClung*, 379 U.S. at 304, 85 S.Ct. at 377, 13 L.Ed.2d at 298. And it is not constitutionally relevant that Congress was actually "legislating against moral wrongs" when it enacted the provisions in question. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257, 85 S.Ct. 348, 357, 13 L.Ed.2d 258, 268 (1946). Chief Justice Marshall's classic formulation of the extent of congressional power is still viable.

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

McCulloch v. Maryland, 4 Wheat 316, 421, 4 L.Ed. 579, 605 (1819).

By these standards, Congress acted within its constitutional power when it enacted section 1985(3) to reach the private conspiracy involved here. It cannot be denied that the aim of protecting interstate commerce from undue burdens is a legitimate end. Congress could reasonably have determined that violent attacks and vandalism perpetrated on the workers of a construction firm engaged in interstate commerce would have a disruptive effect on the flow of products and services among the states. It is also beyond dispute that the aim of protecting interstate workers in the exercise of their First Amendment associational freedoms is a legitimate end. The means adopted for the accomplishment of these ends, a private civil remedy for damages, is plainly reasonable and appropriate. Section 1985(3) as applied to the facts before us is not prohibited by the Constitution and is compatible with both its letter and its spirit. Whether section 1985(3) can constitutionally be applied to other kinds of wholly private conspiracies to deprive persons of their civil rights is a question for another day.

V. THE EVIDENTIARY QUESTION: STANDARD OF PROOF AND SUFFICIENCY OF EVIDENCE

A. *The Standard of Proof*

[15] The unions contend that they cannot be held liable for unlawful acts committed at the Cross construction site by some individual members of their organizations without "clear proof" that they actually participated in the unlawful conduct, gave prior authorization of it, or ratified the acts after actual knowledge of their commission. This more rigorous standard of proof derives from section 6 of the Norris-LaGuardia Act which provides:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States

> for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

29 U.S.C. § 106. This statutory standard of proof thus lies somewhere between the traditional burdens of reasonable doubt and preponderance of the evidence. With it, Congress intended to require "clear, unequivocal, and convincing proof" of union involvement in unlawful conduct to impose liability for it. *United Mine Workers v. Gibbs*, 383 U.S. 715, 737, 86 S.Ct. 1130, 1145, 16 L.Ed.2d 218, 234 (1966). Yet, while section 106 requires clear and convincing evidence as to union authorization, participation in, or ratification of the acts allegedly performed by its members, it does not prescribe a different standard of proof for other issues in actions against a union or its officers or members involved in a labor dispute. *Ramsey v. United Mine Workers*, 401 U.S. 302, 91 S.Ct. 658, 28 L.Ed.2d 64 (1971).

[16, 17] The unions also recognize that section 106 is by its own terms limited to cases in which the union is participating or interested in a labor dispute. The Norris-LaGuardia Act defines a "labor dispute" to encompass

> any controversy concerning terms and conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 113(c). The unions insist that the literal language of section 113(c) squarely covers the conduct at issue here. The persons who planned and executed the attack on the Alligator Bayou construction site were motivated by a desire to punish Cross for engaging in employment practices which violated their misperceived area of exclusive control and to punish those who would work for Cross without attorning to them. Because the conspiracy that generated the case was formed around this nonunion animus, the defendants maintain that the controversy out of which this case arose cannot be anything other than a labor dispute.

This approach has a certain superficial appeal. The attack on the Cross construction site was certainly conceived in reprisal for the refusal of Cross and his workers to accede to demands that the Alligator Pumping Station project be conducted as a union job. Nevertheless, in construing any congressional enactment it is necessary to interpret the meaning of the words as they are used in relation to the setting in which they were written, with due regard to the mischief which the legislation was designed to remedy. In that light, these unions were not participating in a "labor dispute" as that language is employed in section 113(c) because their activity does not fall within the abuses that Congress intended to prevent.

The Norris-LaGuardia Act was passed in a particular social, economic, and legal milieu. During the early part of this century, federal injunctive powers were often invoked to check the spread of union organization and collective bargaining. But Congress conceived that the courts were being made to play a partisan role in labor-management conflicts, in part because judicial injunctive relief usually did nothing to resolve the underlying industrial dispute. The Norris-LaGuardia Act was intended to

curb this unwarranted judicial interference in the struggle between employers and employees. Instead, Congress decided to allow such controversies to be settled through negotiation and through the free play of economic forces.

> The Norris-LaGuardia Act . . . was designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining. . . . Congress acted to prevent the injunctions of the federal courts from upsetting the natural interplay of the competing economic forces of labor and capital.

Brotherhood of Railroad Trainmen v. Chicago River and Indiana Rd., 353 U.S. 30, 39, 77 S.Ct. 635, 640, 1 L.Ed.2d 622, 628 (1957). Thus, the policy section of the Act stresses the worker's "freedom of association, self-organization, and designation of representatives of his own choosing" as indispensable to the private settlement of these disputes. 29 U.S.C. § 102. Congress thereby made the use of legitimate economic weapons—the picket, the strike, the boycott—part of the warp and woof of our national labor relations policy. *See generally Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 250–51, 90 S.Ct. 1583, 1592, 26 L.Ed.2d 199, 210 (1970); *Milkwagon Drivers' Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91, 100–03, 61 S.Ct. 122, 127–28, 85 L.Ed. 63, 68–70 (1940); A.Cox, D.Bok, & R.Gorman, Labor Law 60–64 (8th ed. 1977).

One of the special abuses identified by Congress was the use of vicarious liability doctrines under which the misconduct of a few individuals could be attributed to the labor organization that sponsored a strike or picket line. Courts had applied the common law of conspiracy to hold unions responsible not only for the conduct of their authorized agents, but also "for every act committed by any member of a union merely because he was a member, or because he had some relation in the union although not authorized by virtue of his position to act for the union in what he did." *United Brotherhood of Carpenters and Joiners v. United States*, 330 U.S. 395, 419, 67 S.Ct. 775, 788, 91 L.Ed. 973, 991 (1947) (Frankfurter, J., dissenting).

Congress recognized that this dragnet conspiracy approach to union responsibility could frustrate its chosen labor relations policy. Imposing liability on the union for the unauthorized lawlessness of its more improvident members would penalize the union lawfully engaged in using the legitimate economic weapons necessary for the proper resolution of labor-management conflicts. Therefore, Congress enacted section 106, requiring clear proof of union participation in, authorization, or ratification of unlawful conduct before liability could attach.

However, there is no danger of frustrating the congressional policy favoring collective bargaining and no risk of punishing union engagement in protected activity in the case before us. When the events giving rise to this case occurred, no union had a collective bargaining agreement with Cross, and none was seeking recognition as the collective bargaining representative for Cross's workers. No solicitation or other organizational efforts were in progress to attain representation of the Cross employees. No labor organization was engaged in informational picketing to publicize Cross's employment practices. In short, the attack on the Alligator Bayou construction project did not grow out of any legitimate union activity. The employer-employee relationship was not the matrix of the controver-

sy.[14] The district court found: "the acts of violence ... are manifestations of the ill-will and hatred these union members harbor toward non-union individuals, as well as an attempt by the unions to intimidate and coerce these non-union people from working or being employed within a 'union area.'" This is not the kind of controversy contemplated by Congress when it required "clear proof" of misconduct by a union "participating or interested in a labor dispute."

[18] On the other hand, a labor dispute does exist where unlawful conduct occurs in conjunction with some legitimate union activity. *See, e.g., Cedar Crest Hats, Inc. v. United Hatters, Cap & Millinery Workers Int'l Union*, 362 F.2d 322, 327 28 (5th Cir. 1966). A labor dispute may also exist even though the otherwise legitimate union conduct is unlawful under some other statutory scheme. *See, e.g., Marine Cooks & Stewards v. Panama Steamship Co.*, 362 U.S. 365, 370–71, 80 S.Ct. 779, 783–84, 4 L.Ed.2d 797, 801–02 (1960); *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330, 339 n.15, 80 S.Ct. 761, 766 n.15, 4 L.Ed.2d 774, 781 n.15 (1960); *Milkwagon Drivers' Union v. Lake Valley Farm Products, Inc.*, 311 U.S. at 103, 61 S.Ct. at 128, 85 L.Ed. at 70. But neither situation is present here. Our holding, therefore, is necessarily a very narrow one: where a labor organization purposefully adopts violence as its course—violence not associated with or happening to result from any ongoing legitimate union conduct, the union is not participating in a labor dispute within the meaning of 29 U.S.C. § 113(c). Since the violence at the Alligator Bayou construction site did not occur in conjunction with a labor dispute, the clear-proof standard of section 106 is not applicable.

B. *Sufficiency of the Evidence*

The unions finally urge that the evidence adduced at trial is insufficient to support the judgment against them under any standard of proof. After carefully reviewing

14. In *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association*, — U.S. —, 102 S.Ct. —, 72 L.Ed.2d —, 50 U.S. L.W. 4789 (U.S. June 24, 1982), the Supreme Court considered whether a politically motivated strike was a "labor dispute" within the meaning of the Norris-LaGuardia Act. Two controversies were involved: a political strike and a dispute over whether that strike was barred by the no-strike pledge in the collective bargaining contract. The dispute over the no-strike clause was held to be sufficient to bring the employees' actions within the protections of the Norris-LaGuardia Act. *See id.* at —, 102 S.Ct. at —. In the case before us there was no strike and no underlying collective bargaining contract dispute. The holding of *Jacksonville Bulk Terminals* does not affect our holding today.

The Court noted that even if the dispute over the contract term were absent, this controversy might still be a "labor dispute." The Court reasoned that the union's political "objections were expressed in a work stoppage by employees against their employer, which focused on particular work assignments." *Id.* at — n.12, 102 S.Ct. at — n.12. Thus, the test for determining a labor dispute, whether the employer-employee relationship is the matrix of the controversy, might have been satisfied. *See id.* However, the Court also noted the continuing viability of *Columbia River Packers Association v. Hinton*, 315 U.S. 143, 62 S.Ct. 520, 86 L.Ed. 750. It found that *Hinton* stood for the proposition "that the protections of [the Norris-LaGuardia Act] do not extend to labor organizations when they cease to act as labor groups or when they enter into illegal combinations with nonlabor groups in restraint of trade." *Jacksonville Bulk Terminals v. International Longshoremen's Association*, — U.S. at —, 102 S.Ct. at —. The broad scope of the Norris-LaGuardia Act does have limits. In the case at bar, those limits were exceeded. The defendants were not acting as labor groups. Instead, they sought to dominate "their" territory through force and violence.

the entire record, we agree that the evidence does not warrant the district court's finding of involvement in the conspiracy for many of the unions vouched in judgment. However, as to the remaining unions, we cannot say that the factual conclusions reached by the district court are clearly erroneous.

[19, 20] The factual findings made and the inferences drawn by the district court "come here well armed with the buckler and shield" of the clearly erroneous rule embodied in Federal Rule of Civil Procedure 52(a). *Horton v. U. S. Steel Corp.*, 286 F.2d 710, 713 (5th Cir. 1961). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, 765 (1948). The appellate court must be especially reluctant to disregard a factual finding based upon the evaluation of testimony that draws credibility into question, *Graver Tank and Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 537-38, 93 L.Ed. 672, 676 (1949); it may not consider the evidence anew, *Zenith Radio Corp. v. Hazeltime Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129, 151 (1969); and merely because it might have reached a different result on the same evidence will not justify its setting the district court's findings aside. *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 495-96, 70 S.Ct. 711, 717, 94 L.Ed. 1007, 1016 (1950).

[21] The court below concluded that the assault on the Alligator Bayou construction site "evolved from a meeting held by the Executive Committee of the Sabine Area Building and Construction Trades Council on January 15, 1975, wherein a 'citizen protest' was discussed and a time and place were chosen for such a protest." 461 F.Supp. at 226. However, the evidence in the record does not support this inference. There was nothing unique about the January 15 congregation; it was the Council's regularly scheduled weekly meeting. The minutes of the meeting contain only one cryptic entry which might conceivably be construed to refer to the Cross construction site protest, and it is wholly innocuous.[15] In addition, those union representatives who actually attended the meeting testified that the committee discussed the Cross project and that some members mentioned they had heard of a demonstration to be held on the jobsite the following Friday. The import of their testimony is that the protest had already been conceived several weeks before January 15 and that neither the time nor the place for it were set by the Council. Furthermore, there is no evidence that the Council endorsed the planned protest: no motions were offered and no formal resolutions were adopted. The only connection between the Wednesday meeting and the Friday violence is the nearness in time between the two events. Given the regular sequence of such weekly meetings, this link is too tenuous. As to those unions linked only by the evidence of their participation in the January 15 meeting of the Sabine Area Building and Construction Trades Council, the judgment of the district court must be reversed.

An additional fact casts the district court's error into even sharper relief. The court exonerated two unions as to which the only evidence of involvement was their

15. The minutes show that the "good and welfare" of the community were discussed.

representation at the January 15 meeting, yet it held other unions liable even though the proof against them was no stronger. Furthermore, the district court held the Operating Engineers, Local 450, liable, and that organization neither belonged to the Building and Construction Trades Council nor attended its January 15 meeting nor was otherwise shown to be connected with the violence. The additional evidence relevant to the Operating Engineers is no more compelling. The judgment against the union of Operating Engineers, Local 450, too must be reversed.

However, the situation is different with respect to the United Brotherhood of Carpenters and Joiners of America, Local 610. In mid-summer of 1974, before construction began on the Alligator Bayou project, Cross received a visit in his Houston office from an official of the union. John Wallace, financial secretary and business representative for the Carpenters Local 610, gave Cross his business card and informed him that he wanted the union to furnish laborers for the job. He also asked Cross to sign a union contract. Cross agreed to hire members of Wallace's union but refused to enter into the proposed agreement. Wallace then told Cross that his refusal would "cost him a million dollars."

Wallace had no further contact with the Alligator Bayou project until January 17, 1975, when the attack occurred. On that day, Wallace was present at the highway near the access road which led to the Cross jobsite on at least two separate occasions. More damaging, however, is the fact that Wallace was also observed with Robert Faulk, subsequently identified as one of the principal participants in the violence committed that morning. The two men, riding in Wallace's pickup truck, drove part of the way down the road leading to the construction site, confirmed that the Cross workers had arrived at the scene, and returned to the highway. Shortly thereafter, the mob attacked Cross's workers. Wallace admitted that he was at the highway and that he and Faulk approached the construction site together. Not surprisingly, however, his version is less sinister. He also testified that he saw some members of Local 610 and that, before leaving the area, he expressly instructed them not to engage in any violence. From this evidence, the district court concluded that the union had actually participated in the conspiracy, and we cannot say that his factual inferences and credibility resolution are clearly erroneous. Therefore, the judgment against the United Brotherhood of Carpenters and Joiners, Local 610, is affirmed.

Similarly, we affirm the judgment against the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 195. Bruce Hill, one of two business representatives for the local, appeared at the Cross construction site shortly after the violence had ended. Fulton Johnson, the Corps of Engineers inspector assigned to the Alligator Bayou project, described Hill's conduct at the scene. He testified that Hill was laughing and joking and that his light-hearted demeanor and remarks were highly inappropriate for the gravity of the situation. While Johnson and a colleague were attempting to take photographs of the damage, Hill repeatedly interposed himself in front of the camera, urging him to take his photograph with a burning trailer behind him. Johnson recalled that Hill sarcastically told them he wanted the photograph to post on the bulletin board at the local so that "he could show his men what not to do."

Like Wallace, Hill himself gave a more innocent account of the episode, and denied saying that he wanted the picture for the union bulletin board. His explanation for seeking the photograph was, "I don't know. I guess I am a camera freak. I like to have my picture taken." Although the local's other business representative had attended the January 15 meeting of the Trades Council when the protest was discussed, Hill said he first learned of the events around 8:00 that Friday morning when he overheard some men talking at a grocery store. He stated that he went to the Cross construction site to check on a friend who worked nearby, even though he had never been there to see him before. Although the evidence is sparse, we cannot say that the district court's finding that the Pipefitters Local 195 was involved in the conspiracy is clearly erroneous.

Lastly, we also affirm the district court's finding as to the United Brotherhood of Carpenters and Joiners of America, Local 753. Jay Desormeaux and Curtis Beasley, members but not officers of Local 753, were both observed on the Cross construction site during the violent melee of January 17. Desormeaux recounted a conversation he had with Randy Wylie, assistant business agent for the local, on the preceding Wednesday or Thursday when they discussed the planned protest. Wylie admitted that Desormeaux had called him to ask about the demonstration but denied instructing him to go to the work site. Wylie also admitted seeing Desormeaux at the highway on the fateful Friday morning.

There was still more evidence suggesting that the union had authorized the unlawful conduct. Both Desormeaux and Beasley were named as defendants in this lawsuit. Beasley testified that, after the suit was commenced, Wylie had referred him to the union's own lawyers for representation in matters connected with his part in the violent events of January 17. Desormeaux also stated that he had spoken with both Wylie and W. H. Carr, business agent for Local 753, about obtaining a lawyer and expressed his belief that the union would pay his attorney fees. Carr informed Desormeaux that the union furnishing him with a lawyer would be "the least they could do," since he was a union member. However, Desormeaux knew of no formal arrangement by which the union regularly provided legal services to its members and conceded that the union had never done so for him. Wylie denied talking with Desormeaux about attorney fees, but, apart from that denial, the union made no effort to rebut this testimony. It did not deny furnishing legal services for its members in actions arising from the violence. The evidence in the record permitted the inference that the union sponsored the attack on the Cross employees and then undertook to lend assistance to its members who were discovered in the unlawful enterprise. The appellate issue is not whether we might have taken a different view had the evidence been presented initially to us. It is whether the district court's determination that the Carpenters Local 753 authorized or participated in the attack is clearly erroneous. It is not.

VI. CONCLUSION

In summary, we hold that (1) the anti-injunction provisions of the Norris-LaGuardia Act do not deprive the district court of jurisdiction to enjoin violence, and (2) Congress intended 42 U.S.C. § 1985(3) to provide a remedy for private conspiracies directed at nonracial classes. Specifically, we determine that the statute encompasses a

conspiracy designed to deprive nonunion workers of the First Amendment right to freely associate with one another where that conspiracy does not occur in conjunction with legitimate union activity and is perfected by force and violence. In addition, we hold that the Commerce Clause empowers Congress to reach the private conspiracy involved in the case before us. Furthermore, since this case does not involve a labor union participating or interested in a labor dispute within the meaning of 29 U.S.C. § 113(c), the clear-proof standard of 29 U.S.C. § 106 is inapplicable. We conclude that the district court's findings that the Carpenters Local 610, Pipefitters Local 195, and Carpenters Local 753 authorized or participated in this conspiracy were not clearly erroneous. Nevertheless, we find that the evidence of participation in the conspiracy is insufficient to warrant the district court's judgment against the remaining eight unions.

In light of the foregoing, the judgment of the district court is

AFFIRMED IN PART AND REVERSED IN PART.

ALVIN B. RUBIN and JERRE S. WILLIAMS, Circuit Judges, with whom JOHN R. BROWN, VANCE, KRAVITCH, RANDALL, TATE and SAM D. JOHNSON, Circuit Judges, join, dissenting:

No one can condone an unprovoked and brutal attack on law-abiding citizens who are peacefully minding what is literally their own business. However, the issue before us is not the reprehensibility of the conduct but whether the district court properly issued an injunction in a case over which, we submit, Congress has, by the terms of the Norris-LaGuardia Act, denied federal courts jurisdiction. Our colleagues also interpret the Ku Klux Klan Act of 1871 in an unprecedented fashion to permit damages to be imposed for an assault, a state law tort, merely because it occurred in the course of a dispute about whether union or nonunion workers would do a job. Further our colleagues impose t' is liability without the stringent evidentiary findings exacted by the Norris-LaGuardia Act. We, therefore, respectfully dissent.

The factual background is accurately stated in the majority opinion. These facts lead the majority to conclude that the defendant labor organizations purposefully adopted violence as their course, Slip op. page 15467, page —— *supra*, that a group of about fifty persons who were either union members or union sympathizers drove to the jobsite in four pickup trucks, and there brutally beat A. A. Cross ("Cross"), the president and controlling stockholder of A. A. Cross Construction Company, Inc. ("Cross Construction"), and several of the construction company's employees, including Paul Scott and James Matthews. Scott was an engineer and assistant superintendent; Matthews was a bookkeeper and timekeeper.[1]

1. James Matthews did not testify at trial, nor was he deposed by any party. The district court, however, awarded him $5,000 in damages from the defendant labor unions. A. A. Cross stated in a post-trial deposition that, after the January 17 incident, he decided to maintain Cross Construction's records in Houston and accordingly paid Matthews's Houston hotel bill while Matthews worked there on the company's recordkeeping. Cross further testified that Matthews had been threatened several times after the January 17 incident, was subsequently fired from Cross Construction for cause, and that he did not know Matthews's current whereabouts. Paul Scott stated in his deposition that, to the best of his knowledge, Matthews was in New York.

I. THE PRIVATE INJUNCTION AND THE NORRIS-LAGUARDIA ACT

The judgment of the district court affirmed by the majority included a permanent injunction against the defendant labor organizations. The majority, in finding that the district court had authority to issue the injunction, neglects the original purpose, as well as the half century of interpretation and application, of the Norris-LaGuardia (Anti-Injunction) Act, 29 U.S.C. §§ 101–115 (1976), passed in 1932.

The patent purpose of the Norris-LaGuardia Act was to limit stringently the jurisdiction and authority of federal courts to enjoin labor disputes.[2] The Act requires three determinations. First, the court must decide whether a labor dispute is involved. Second, to have jurisdiction to issue an injunction under the Act, the court must make all five findings required by 29 U.S.C. § 107: (1) unlawful acts have been threatened and will be committed or have been committed and will be continued; (2) irreparable injury will follow; (3) the balance of injury is more severe on the complainant than the harm the injunction inflicts on the defendant; (4) there is no adequate remedy at law; and (5) the public officers charged with the duty to protect the complainant's property are unable or unwilling to furnish adequate protection. Third, the injunction, if issued, must not prohibit any of the activities listed in 29 U.S.C. § 104.[3]

2. When the Labor Management Relations (Taft-Hartley) Act of 1947 was passed, there was concern that the power given to the National Labor Relations Board to obtain injunctions in labor disputes and to issue cease and desist orders was a limitation upon the Norris-LaGuardia Act. The Taft-Hartley Act did indeed curtail the Norris-LaGuardia Act, but it was carefully written to ensure that no increased power to obtain labor injunctions was placed in the hands of private litigants. The labor injunctions and cease and desist orders authorized by the Taft-Hartley Act against unions and their members must be initiated and controlled by the government. Senator Smith, who was handling the debate on the Taft-Hartley Act on the floor of the Senate on behalf of its proponents, was asked if the Taft-Hartley Act would not "slice a wedge" from the Norris-LaGuardia Act on injunctions. His reply was "we were very careful in this bill to protect the injunctive process as it is protected in the Norris-LaGuardia Act, *except in the exceptional cases where the Government has to step in.*" Cong.Rec. 4,411 (April 30, 1947) (emphasis added).

The Supreme Court later commented:

> The short answer to the argument that the Labor Management Relations Act of 1947 . . . has removed the limitations of the Norris-LaGuardia Act upon the power to issue injunctions against what are known as secondary boycotts, is that the law has been changed only where an injunction is sought by the National Labor Relations Board, not where proceedings are instituted by a private party.

Bakery Sales Drivers Local 33 v. Wagshal, 333 U.S. 437, 442, 68 S.Ct. 630, 632, 92 L.Ed. 792, 796 (1948).

3. No court has jurisdiction to issue an injunction growing out of a labor dispute to prohibit any persons from doing any of the following:

> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in [section 3 of this Act];
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

The majority concedes that the requirements of § 107 were not met in this case, slip op. page 15449 n.3, page —— n.3 *supra*, but sidesteps deciding whether this is jurisdictional. The statute itself, however, is unequivocal: "No court of the United States shall have *jurisdiction* to issue a temporary or permanent injunction . . . except after [the required] findings of fact [have been made] by the court." 29 U.S.C. § 107 (emphasis added). Indeed, the entire thrust of the Norris-LaGuardia Act is to deny district courts jurisdiction with respect to injunctions in labor disputes.[4] Our colleagues justify the injunction, however, by finding that there was no "labor dispute" as defined in the Act. That definition is:

> The term "labor dispute" includes *any controversy concerning terms or conditions of employment, or concerning the association* or representation *of persons in* negotiating, fixing, *maintaining*, changing, or seeking to arrange terms or conditions of *employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.*

29 *Id.* § 113(c) (emphasis added).

Even according to the majority view, this was a "controversy concerning terms or conditions of employment" *and* "concerning the association . . . of persons in . . . maintaining . . . employment." Not only was the controversy thus one literally embraced by the Act, but it was also covered by the Act's embracive purpose. The definition of a labor dispute is broad and should be broadly read because the Act caters to the need of labor organizations to organize entire industries. Gregory & Katz, Labor and the Law 190 (3d ed. 1979). It abrogates the view, once held by some, that there can be a labor dispute only between persons in an employee-employer or prospective employee-employer relationship. Instead, it includes in its ambit all laboring people and their unions. It is not confined to formal efforts to have employees sign union authorization cards. Its terms precisely characterize as a labor dispute the controversy involved in this case: a group of employees and labor unions protesting the failure of an employer working in their community to hire union workers and to sign collective bargaining agreements with local unions.

While the unions were not engaged in a formal campaign to sign up employees of Cross Construction at the exact time of the critical incident,[5] the entire thrust of their activities from the time Cross Construction entered the community was organizational. As the majority opinion indicates, on one occasion the business representative for the carpenters' local told Cross, "this is union

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in [section 3 of this Act].

29 U.S.C. § 104.

4. *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 329-30, 58 S.Ct. 578, 581-82, 82 L.Ed. 872, 877 (1938) ("The District Court made none of the required [§ 107] findings save as to irreparable injury and lack of remedy at law. It follows that in issuing the injunction it exceeded its jurisdiction.").

5. As the majority reports: "Cross did not have a collective bargaining agreement with any labor union." Slip op. page 15446, page —— *supra*.

country," and added that, if Cross persisted in using non-union labor, it was "going to cost [him] a million dollars." Slip op. page 15446, page —— *supra*. Cross Construction employees were confronted by local union members in various public gathering places in the community. Local unions and their members also threatened to picket the construction project because it was non-union. The public demonstration the morning the violence occurred was obviously a form of informational mass picketing to publicize Cross Construction's employment practices.

The majority finds that, "where a labor organization purposefully adopts violence as its course—violence not associated with or happening to result from any ongoing legitimate union conduct, the union is not participating in a labor dispute within the meaning of 29 U.S.C. § 113(c)." Slip op. page 15467, page —— *supra*. Violence, however, is not a stranger to the labor union movement nor does its presence vitiate the existence of a dispute. If the dispute concerns labor matters, it does not cease to be a labor dispute because it becomes violent. This court early held that the use of violence to achieve a labor objective does not prevent the activity from being considered a labor dispute within the Norris-LaGuardia Act. *Carter v. Herrin Motor Freight Lines, Inc.*, 131 F.2d 557 (5th Cir. 1942). This view is amply supported throughout the history of litigation under the Act.[6]

The majority concedes that "a labor dispute does exist where unlawful conduct occurs in conjunction with some legitimate union activity .... [or where] the otherwise legitimate union conduct is unlawful under some statutory scheme." Slip op. pages 15467, pages —— - —— *supra*. This fails to explain why unlawful conduct falls within the ambit of the Act only if it is connected with *legitimate*[7] union conduct, for the Norris-LaGuardia Act does not confine its definition of labor disputes to those involving legitimate conduct. Indeed, by definition, the Act is applicable *only* when the union is engaging in unlawful conduct.[8] We cannot assume that any

6. *E.g., United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) (Court found there was a labor dispute even though members of the United Mine Workers forcibly prevented the opening of a mine staffed by members of a rival union organization, threatened the employer, and beat an organizer for the rival union; mine was finally reopened when UMW miners were hired.); *Milk Wagon Drivers' Local 753 v. Lake Valley Farm Prods., Inc.*, 311 U.S. 91, 96, 61 S.Ct. 122, 124, 85 L.Ed. 63, 66 (1940) (union organizing drive was acrimonious and frequently violent: "store windows were broken, personal altercations occurred, charges and countercharges were frequent, arrests were made and court proceedings instituted"; nevertheless the Court found that a labor dispute existed); *Lake Charles Stevedores, Inc. v. Mayo*, 20 F.Supp. 698 (W.D. La.1935) (union, striking to gain recognition, engaged in a pitched battle, including gunfire, with private armed guards brought in by port authorities; district court granted an injunction, but only after specific findings that the requirements of § 107 were satisfied.); *see also* Gregory & Katz, Labor and the Law 190 (3d ed. 1979) ("Congress did not give organized labor a complete carte blanche." Labor activities after the passage of the Norris-LaGuardia Act were "still subject to other legal procedures such as criminal proceedings and actions for damages, where appropriate.").

7. Whether the defendants' activities were otherwise "legitimate" depends only on whether the local unions were in compliance with the technical requirements for organizational activity under the National Labor Relations Act. Concededly, they were not. But it is not essential to the existence of a labor dispute that the contest be connected with "legitimate" labor activity or that it be peaceful.

8. *See California Ass'n of Employers v. Building & Constr. Trades Council*, 178 F.2d 175 (9th Cir. 1949) (holding that the controversy in-

court would issue an injunction against *lawful* activities, and of the five prerequisites to the issuance of an injunction, already listed, one demands a finding that unlawful acts have been threatened and will be committed.

A "labor dispute" can, indeed, be fomented even without traditional labor activity. Thus in *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 58 S.Ct. 703, 82 L.Ed. 1012 (1938), a grocery store owner was picketed by a group protesting the shop's refusal to hire blacks. No member of the group was employed by the shop, and the group was not a labor organization. The Supreme Court, nevertheless, held that the pickets were publicizing a controversy about the shop owner's "terms and conditions of employment" and that the picketing grew out of a labor dispute.[9]

National policy, as reflected in labor legislation, was being implemented precisely as Congress intended until the district court granted the injunction at the behest of Cross Construction. The National Labor Relations Board ("NLRB") had filed unfair labor practice charges against the Sabine Area Building and Construction Trades Council and the various unions that were council members for their actions, including the violence in the episode that is the subject of this lawsuit. The NLRB had issued a cease and desist order that prohibited the Trades Council and the unions from, among other things:

> (a) Restraining or coercing employees of Cross Construction Co., Inc. or any other employer, in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, as amended, including the right to refrain from joining or assisting any constituent local union of Sabine Area Building & Construction Trades Council, AFL-CIO, by: threatening, assaulting, or inflicting bodily harm on said employees, threatening, assaulting, or inflicting bodily harm on supervisory or management personnel of Cross Construction Co., Inc.; and damaging or destroying property and equipment belonging either to Cross Construction Co., Inc., to its supervisory or management personnel, or to its employees.
>
> (b) Organizing, encouraging, sanctioning and engaging in mass picketing by its constituent local unions at the entrance to the roadway leading to the Alligator Bayou Pumping Station and Drainage Structure construction project in order to obstruct or impede ingress or egress to said jobsite.
>
> NLRB Case 23-CB-1624, May 1, 1975.

This order says it all. It was upheld and enforced by us as a result of a settlement stipulation in an unpublished opinion,[10] long before the injunction was issued in this case. Ironically, the majority finds no "labor dispute" in the very situation that caused the NLRB to file charges and to issue a stipulated cease and desist order. The NLRB had jurisdiction only if there

volved a labor dispute although the union was insisting on a closed shop and closed shops had previously been outlawed by the Taft-Hartley Act).

9. *See also Marine Cooks & Stewards v. Panama S.S. Co.*, 362 U.S. 365, 80 S.Ct. 779, 4 L.Ed.2d 797 (1960). A union picketed a foreign ship that employed foreign seamen and paid them less than the going American wage rates. The foreign employees had no dispute with the vessel owners, and the unions had no desire to organize or to represent the foreign employees. The Supreme Court held, however, that the Norris-LaGuardia Act applied, finding that the picketing related to the terms and conditions of employment.

10. *NLRB v. Sabine Area Bldg. & Constr. Trades Council*, No. 75-2481 (5th Cir. June 24, 1975).

was a labor dispute. Thus we at once hold an occurrence not to be a labor dispute for purposes of the Norris-LaGuardia Act (which emphasizes the breadth of the definition of labor dispute)[11] but to be one for purposes of the National Labor Relations Act ("NLRA") despite universal recognition that the "definition of 'labor dispute' in this Act [NLRA] and in the Norris-LaGuardia Act . . . are virtually identical."[12]

The brutal assault on Cross Construction employees was overt criminal conduct that should also have been *and was* prosecuted by state law enforcement authorities. The Act permits injunctive intervention only when "public officers charged with the duty to protect complainant's property [and, we submit, their persons] are unable or unwilling to furnish adequate protection." 29 U.S.C. § 107(e), against *future*, not past unlawful activity.[13]

The Supreme Court has just reaffirmed the broad interpretation of the definition of labor dispute in the Norris-LaGuardia Act which has been the law since the Act was passed. *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association*, — U.S. —, 102 S.Ct. —, 72 L.Ed.2d —, 50 U.S.L.W. 4789 (U.S., June 24, 1982). As reported in the majority opinion (fn. 14), the Court held that a dispute involving the refusal to load cargo to Russia in protest of Soviet intervention in Afghanistan was a labor dispute within the meaning of the Act.

The majority opinion relies upon the Court's statement that the employer-employee relationship was the "matrix" of the dispute in *Jacksonville Bulk Terminals*. First, it needs to be emphasized that, as pointed out above, a unionized workforce was the "matrix" of the dispute in the instant case—clearly a labor dispute objective. Second, the matrix statement must be taken in the context that *Jacksonville Bulk Terminals* was a dispute between employers and their employees. As has been shown above, the employer-employee relationship is not a requirement to establish a labor dispute under the Act. Indeed, to show the breadth of the definition of labor dispute in the Act, the opinion in *Jacksonville Bulk Terminals* relies heavily upon the *New Negro Alliance* case, *supra*, where there was not even a prospective employer-employee relationship.

What is of most importance in *Jacksonville Bulk Terminals* is the Court's extensive emphasis upon the history of the development of the Norris-LaGuardia Act to show the breadth of the definition of labor dispute. The Court said that to narrow the definition would "embroil federal judges in the very scrutiny of 'legitimate objectives' that Congress intended to prevent when it passed the Act." — U.S. at —, 102 S.Ct. at —. The Court then concluded: "In the past, we have consistently declined to constrict Norris-LaGuardia's broad prohibitions *except in narrowly defined situations where accommodation of that Act to*

11. The Supreme Court has noted that "Congress made the definition [of "labor dispute" in the Norris-LaGuardia Act] broad because it wanted it to be broad. There are few pieces of legislation where the congressional hearings, committee reports, and the language in the legislation itself more clearly point to the necessity for giving an Act a construction that will protect the congressional policy the Act adopted." *Order of R. R. Telegraphers v. Chicago & N. W. Ry.*, 362 U.S. 330, 335, 80 S.Ct. 761, 764, 4 L.Ed.2d 774, 779 (1960).

12. *National Maritime Union of Am. v. NLRB*, 342 F.2d 538, 541 (2d Cir.), *cert. denied*, 382 U.S. 835, 86 S.Ct. 78, 15 L.Ed.2d 78 (1965).

13. As stated above, the court must find prior to issuing an injunction, that "unlawful acts have been threatened and *will be* committed . . . or have been committed and *will be* continued." 29 U.S.C. § 107(a) (emphasis added).

specific congressional policy is necessary. We refuse to deviate from that path today." *Ibid.* (emphasis added).

No specific congressional policy exists in this case to justify deviation. Instead, congressional policy as clearly established was carried out in the action under the National Labor Relations Act.

The Norris-LaGuardia Act applies to every kind of labor dispute, and not only to conventional organizing campaigns conducted under the auspices of the NLRB. Indeed, as both the NLRB and a panel of this court have found, this was plainly an organizational labor dispute. The federal district court had no jurisdiction to issue the injunction.

II. SECTION 1985(3) DOES NOT GRANT A CAUSE OF ACTION FOR THE DEFENDANTS' CONDUCT

A. The Nature of the Right for Which § 1985(3) Provides a Remedy

Section 1985(3) provides that an injured party "may have an action for the recovery of damages" "[i]f two or more persons . . . conspire . . . for the purpose of depriving . . . any person or class of persons of the *equal* protection of the laws or of *equal* privileges and immunities under the laws." 42 U.S.C. § 1985(3) (emphasis added).[14] This language does not establish a cause of action for every deprivation of any legal right, privilege, or immunity. The statute condemns only conspiracies to deny *equal* protection or *equal* privileges and immunities. If these restrictive terms are overlooked in interpreting the statute, its reach is ubiquitous; for it would then authorize a federal tort action for every conspiracy to deprive *any person or class of persons* of *any* legal right.

In *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971), the Supreme Court recognized that § 1985(3) is premised on a conspiracy to deny equality and is not a general federal tort law.[15] To show that the conspiracy was designed to deny a person equality, the Court said, the plaintiff must demonstrate that the purpose

14. 42 U.S.C. § 1985(3) provides in full:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

15. "That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others." *Griffin*, 403 U.S. at 101, 91 S.Ct. at 1798, 29 L.Ed.2d at 347. *See also* Cong. Globe, 42d Cong., 1st Sess. 485 (1871) (remarks of Rep. Cook addressing Rep. Shellabarger's amendment to the original proposed Act):

of the conspiracy was "a deprivation of the *equal enjoyment* of rights secured by the law to all," not merely the infliction of an injury on that person. *Id.* at 102, 91 S.Ct. at 1798, 29 L.Ed.2d at 348 (emphasis added). The necessary corollary is that a conspiracy merely to injure one person or a group of persons, or even some or all of the members of a *class* of persons, does not give rise to an action under the statute.

This interpretation of the statute is supported by the history of its enactment. That history, often recounted in fragments, is reported at length in Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U.Chi.L.Rev. 402 (1979).[16] Section 1985(3) was adopted in reaction to the activities of the Ku Klux Klan. The original Klan, which had begun to operate in the South prior to 1871, was for the most part a political organization.[17] In enacting § 1985(3), Congress did not seek primarily to prevent racial discrimination but to proscribe conspiracies whose objective or effect was to frustrate the "constitutional operations of government through assaults on the person, property, and liberties of individuals."[18]

The Forty-Second Congress, dominated by a Republican majority, became alarmed at reports of violent activities of the Klan and similar organizations, such as the Knights of the White Camelia, the White Brotherhood, the Pale Faces, and the '76 Association.[19] It established a joint committee to investigate the Klan.[20] The Republican majority thought the Klan's objective was to wrest control of the southern state governments from the Republican Party and to reestablish Democratic governance.[21] Democrats also viewed the Klan's objectives as political,[22] but considered them

> I think it is within the power of Congress to protect and enforce every right secured to American citizens by the Constitution of the United States. I do not believe, and I do not know of any man who does believe, . . . that Congress has a right to punish an assault and battery when committed by two or more persons within a State. I know of no one who believes that Congress has any right to enforce the laws of a State except in the emergency contemplated in the Constitution, when the State may be unable to do so by reason of lawless combination too strong for the State authorities to suppress. The statement that this bill aims at any such end is an utter misstatement of its object and effect.

16. *See generally* 1 Statutory History of the United States 591–656 (B. Schwartz ed. 1970); Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 St. Louis U.L.J. 331 (1967).

Section 1985(c) was renumbered § 1985(3). 42 U.S.C. § 1985(3) (Supp. III 1979).

17. *See* Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U.Chi.L.Rev. 402, 408 n.32 (1979) [hereinafter cited as *A Construction of Section 1985(c)*].

18. *Id.* at 403.

19. *A Construction of Section 1985(c)*, *supra* note 17, at 407 n.29, (citing K. Stampp, The Era of Reconstruction 199 (1965)).

20. Cong.Globe, 42d Cong., 1st Sess. 116–17 (1871), *id.* at 180–82.

21. *Id.* at 653, col. 3 (The Klan's "well-defined and clearly-proven object is to gain political control by intimidation and murder.") (remarks of Sen. Osborn (R-Fla.)); *id.* at 484, col. 1 (The "purpose of all this bloody work . . . is for the express purpose of controlling government in the states where these things are done, by preventing citizens from exercising their legitimate constitutional privileges.") (remarks of Rep. Wilson (R-Ind.)).

22. *See id.* at 517, col. 2 ("the minority of the committee reach the same conclusion as the majority reach as to the fact that the disorders have a political origin and purpose, the difference being, in substance, that the majority find it to originate in an aim at the overthrow of the reconstruction laws and the people and State governments they were designed to protect, while the minority seem to conclude that the violence is natural and just in resistance of

honorable, adopted to resist unjust laws and to restore control of governmental affairs to "the wise, virtuous, influential men of the South," dislodging "adventurers and negroes."[23]

The first proposed Ku Klux Klan Act made it criminal to conspire to commit particular crimes "in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States."[24] It authorized no civil action. Some more moderate Republicans opposed the proposal as a usurpation of the states' power to punish crimes. Other members of Congress opposed the enactment on the basis that the federal government lacked power to prohibit the acts of private individuals. Another group believed that Congress could punish only those "private conspiracies intended to obstruct the performance of government officials' constitutional duty to provide equal protection of the laws."[25] Still others believed that, regardless of its power, the federal government should provide protection for individuals against private conspiracies only when the state failed to do so.[26]

An amendment suggested by Congressman Burton Cook (R-Ill.) and drafted by Congressman Charles Willard (R-Vt.)[27] satisfied the constitutional objections and provided an acceptable compromise. For the language first proposed in the criminal statute prohibiting conspiracies "in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and the laws of the United States," the amendment substituted the words "for the purpose of depriving any persons or class of persons, *directly or indirectly, of the equal protection of the laws*, or of *equal* privileges and immunities under the laws."[28] The amendment also added the civil cause of action that we now consider.[29]

It is thus obvious that one purpose of this amendment was to confine the operation of the statute to discriminatory deprivations of rights. As the draftsman of the limiting amendment, Representative Willard, said, the amendment "provid[ed] that the essence of the crime should consist in the intent to deprive a person of the equal protection of the laws and of equal privileges and immunities under the laws; in other words, that the Constitution secured, and was only intended to secure, equality of rights and immunities, and that we could only punish by United States laws a denial of that equality."[30] Congressman Horatio Burchard (R-Ill.) explained that the conspiracies condemned were "those designed to prevent the equal and impartial administration of justice.... The gravamen of the offense

wicked laws") (remarks of Rep. Shellabarger (R-Ohio)).

23. *Id.* at 386, col. 2 (remarks of Rep. Lewis (D-Ky.)). *See also* additional references in *A Construction of § 1985(c), supra* note 17, at 408-09 & n.32.

24. Cong.Globe, 42d Cong., 1st Sess. 68 app. (1871).

25. *A Construction of Section 1985(c), supra* note 17, at 415, and authorities cited therein. *See generally id.* at 411-17.

26. *Id.* at 415-16, and authorities cited therein.

27. *Id.* at 417.

28. Cong.Globe, 42d Cong., 1st Sess. 477, col. 3 (1871) (emphasis added).

29. *Id.* As one commentator has noted: "This addition of remedy was not a subject of congressional discussion or debate. It was presumably inspired at least in part by concern for the victims of acts of terror or indirect subversion committed to inhibit the exercise of the rights of citizens." *A Construction of Section 1985(c), supra* note 17, at 417.

30. Cong.Globe, 42d Cong., 1st Sess. 188 app., col. 2 (1871).

is the unlawful attempt to prevent a State through its officers enforcing in behalf of a citizen of the United States his constitutional right to equality of protection."[31] Others echoed this analysis.[32]

In *Griffin*, the Supreme Court interpreted § 1985(3) in a fashion consistent both with its literal language and this congressional intention:

> The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

403 U.S. at, 102, 91 S.Ct. at 1798, 29 L.Ed.2d at 348 (footnotes omitted). The statute thus has a "motivation aspect." Relying on the legislative history we have recounted, the *Griffin* Court explained that the requirement of "invidiously discriminatory motivation stressed by the sponsors of the limiting amendment" was necessary to avoid "constitutional shoals." *Id.* The forbidden purpose of § 1985(3) is the denial of equality under the laws, not merely an injury forbidden by law.[33]

Although § 1985(3) reaches both public and private conspiracies to deny constitutional equality, it is a non sequitur to conclude that it, therefore, reaches all constitutional violations. The statute is not designed to protect constitutional rights; it is at once narrower, safeguarding equality, and broader, protecting against any conspiracy to deny equal protection of the "laws."[34]

31. *Id.* at 315 app., col. 2.

32. *Id.* at 478, col. 2 ("The object of the amendment is . . . to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of remedies of this section.") (remarks of Rep. Shellabarger); *id.* at 486, col. 3 (remarks of Rep. Cook (R Ill.)); *id.* at 514, col. 3 (remarks of Rep. Poland (R-Vt.)).

33. *See A Construction of Section 1985(c), supra* note 17, at 437 ("The enacting Congress did not intend the statute to be an antidiscrimination law. The language of *equal* protection and *equal* privileges and immunities was added as a limitation, not as an expansion.").

This is the interpretation of § 1985(3) that we adopted in *McClellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (en banc). Turning first to what private action constitutes a deprivation of the protection of the laws, we held that "the inquiry must initially concentrate on the legality of the defendants' activity apart from section 1985(3). If the object of the defendants' conspiracy did not include a violation of some law (independent of section 1985(3) itself) which protects the plaintiff, the conspiracy could not have deprived the plaintiff of the 'protection of the laws.'" *Id.* at 925. We then turned to the requirement that the deprivation be of the *equal* protection of the laws, and held that violation of *equality* is a separate component of the action although we declined to decide whether the section extends to other bias than racial. *Id.* at 929.

Section 1985(3) also prohibits conspiracies "for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws." Although § 1985(3) claims do not typically allege that state authorities are "unwilling or unable to provide protection," the language of the statute, allows it to reach "indirect efforts to thwart equal protection." *A Construction of Section 1985(c), supra* note 17, at 420.

34. Some courts have held that § 1985(3) covers violations of federal statutory rights. *E.g., Hodgin v. Jefferson*, 447 F.Supp. 804 (D.Md. 1978) (claims based on § 3 of the Equal Pay Act); *Broadcast Employees v. International*

The Supreme Court held in *Griffin* that the reach of § 1985(3) is limited by the requirement that the conspiracy be directed at a denial of equality. Our colleagues state, however, that in *Griffin* "[t]he blacks brought an action under section 1985(3) *to redress violations of the laws of the United States and of Mississippi*, including the rights of free speech, assembly, association, interstate travel, liberty, and security of their persons." Slip op. page 15450, page —— *supra* (emphasis added). If that were the basis of the action in *Griffin*, then *Griffin* would be authority for a simple tort action. The complaint in *Griffin* was more subtle.[35] In addition to the language quoted by the majority, the complaint stated that the purpose of the conspiracy " 'was to prevent [the] plaintiffs and other Negro-Americans, through . . . force, violence and intimidation, *from seeking the equal protection of the laws* and from enjoying the equal rights, privileges and immunities of citizens under the laws of the United States and the State of Mississippi, including . . . their rights to freedom of speech, movement, association and assembly.' " 403 U.S. at 90, 91 S.Ct. at 1792, 29 L.Ed.2d at 341. The assault on and battery of the plaintiffs were acts done in furtherance of the conspiracy to deny the plaintiffs *equal* rights, not acts designed merely to injure the plaintiffs or to deprive them of the protection of the law.

In *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372, 99 S.Ct. 2345, 2349, 60 L.Ed.2d 957, 963 (1979), the Supreme Court held that "[s]ection 1985(3) provides no substantive rights itself; it

Bhd. of Teamsters, 419 F.Supp. 263 (E.D.Pa. 1976) (conspiracy to violate Labor Management Reporting and Disclosure Act), *aff'd in part and reversed in part on other grounds*, 614 F.2d 846 (3d Cir. 1980); *Milner v. National School of Health Technology*, 409 F.Supp. 1389 (E.D.Pa.1976).

In *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 370 n.6, 99 S.Ct. 2345, 2348 n.6, 60 L.Ed.2d 957, 962 n.6 (1979), however, the Supreme Court specifically declined to decide "whether § 1985(3) creates a remedy for statutory rights other than those fundamental rights derived from the Constitution." Justice Powell suggested in his concurring opinion that the statute's "reach is limited to conspiracies to violate those fundamental rights derived from the Constitution." *Id.* at 378, 99 S.Ct. at 2352, 60 L.Ed.2d at 967. Justice Stevens went further and said, "I do not believe that [§ 1985(3)] was intended to provide a remedy for the violation of statutory rights—let alone rights created by statutes that had not yet been enacted." *Id.* at 385, 99 S.Ct. at 2355, 60 L.Ed.2d at 971 (concurring opinion). Justices White, Brennan, and Marshall expressed the opposite view in their dissenting opinion: "[Section] 1985(3) encompasses all rights guaranteed in federal statutes as well as rights guaranteed directly by the Constitution." *Id.* at 384 n.5, 99 S.Ct. at 2357 n.5, 60 L.Ed.2d at 971 n.5; *cf.* Note, *Private Conspiracies to Violate Civil Rights: The Scope of Section 1985(3) After Great American Federal Savings & Loan Association v. Novotny*, 61 B.U.L.Rev. 1007, 1028–33 (1981) (arguing that § 1985(3) should be applied "only to statutes whose primary purpose is to guarantee equal treatment").

Some courts have also held that "[v]iolations of state conferred rights and privileges are sufficient to constitute a deprivation of 'equal protection of the laws.' " *Life Ins. Co. of N. Am. v. Reichardt*, 591 F.2d 499, 504–05 (9th Cir. 1979) (violation of California's Civil Rights Act) (decided before *Novotny*); *accord, Harrison v. Brooks*, 446 F.2d 404 (1st Cir. 1971) (zoning law infringement). The Supreme Court suggested in *Novotny*, however, that a denial of rights under *state* laws may not be covered under § 1985(3) unless independently unconstitutional. *See* 442 U.S. at 377, 99 S.Ct. at 2351, 60 L.Ed.2d at 966 (§ 1985(3) provides "a civil cause of action when some otherwise defined *federal* right—to equal protection of the laws or equal privileges and immunities under the laws—is breached by a conspiracy in the manner defined by the section") (emphasis added).

35. *Griffin* arose out of the dismissal of a complaint for failure to state a cause of action.

merely provides a remedy for violation of the rights it designates."[36] Thus, § 1985(3) provides a cause of action for *private* interference only with those rights that the Federal Constitution protected prior to the enactment of the Civil Rights Act of 1871, and in particular, for those rights protected by the newly ratified fourteenth amendment. *See Novotny*, 442 U.S. at 383, 99 S.Ct. at 2354, 60 L.Ed.2d at 970 (Stevens, J., concurring). Insofar as equal protection of the laws is concerned, the cause of action is restricted not only to conspiracies to deny *equality*, but the conspiracy must also be directed at the denial of *protection of the laws*, in the sense that it must be aimed at preventing the injured party from obtaining legal protection. *See id.* at 384, 99 S.Ct. at 2355, 60 L.Ed.2d at 971; *A Construction of Section 1985(c), supra* note 17, at 407, 419.

The extension of § 1985(3) to protect against *private* infringement of every right protected against *governmental* action by the Constitution would create a *Bivens*-type tort action against every private conspiracy that affects a federal constitutional right.[37] A citizen has a right to be secure in his property and home, but we do not think that § 1985(3) confers a cause of action for a conspiracy by a person's neighbors to block his driveway in order to keep him from driving his automobile to his place of business. The fourth amendment protects against illegal searches, but we do not think that, if two persons conspire to search their neighbor's house, the neighbor has a § 1985(3) action.[38] In neither case would

36. *Novotny* held that § 1985(3) could not be invoked to redress violations of Title VII. Rights created by the Equal Employment Opportunity Act could not "be asserted within the *remedial* framework of § 1985(3)" because Title VII provided its own remedial apparatus. 442 U.S. at 377, 99 S.Ct. at 2351, 60 L.Ed.2d at 966; *cf.* Note, *supra* note 34, at 1019-21 (arguing that § 1985(3) is "neither purely remedial nor purely substantive, but rather a mixture").

37. In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), the Court held that there was a federal cause of action for damages under the fourth amendment upon proof of damages resulting from violations of that amendment by federal agents acting under color of federal authority.

38. We, therefore, agree with the Fourth Circuit's refusal to recognize a § 1985(3) cause of action for private interference with the "associational right" of belonging to the Ku Klux Klan. *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (4th Cir. 1974). This holding is correct, in part, because the right of association derives from the first amendment—itself framed as a *prohibition* against the *federal government* and not against private persons. A number of other courts have declined to extend § 1985(3) protection to infringements of all constitutional rights.

First amendment:
Murphy v. Mount Carmel High School, 543 F.2d 1189 (7th Cir. 1976).

Sex discrimination:
Doski v. M. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976) (employment); *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818 (7th Cir. 1975) (employment), *cert. denied*, 425 U.S. 943, 96 S.Ct. 1683, 48 L.Ed.2d 187 (1976).

Procedural due process:
Briscoe v. Bock, 540 F.2d 392 (8th Cir. 1976); *Collins v. Bensinger*, 374 F.Supp. 273 (N.D. Ill.) (recognizing that § 1985(3) refers only to equal protection and not due process), *aff'd mem.*, 506 F.2d 1405 (7th Cir. 1974), *cert. denied*, 422 U.S. 1058, 95 S.Ct. 2683, 45 L.Ed.2d 710 (1975).

Other courts, however, have held that § 1985(3) reaches every private conspiracy that Congress has *power* to forbid. *E.g., Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975) (interference with right to vote in tribal elections), *cert. denied*, 424 U.S. 958, 96 S.Ct. 1436, 47 L.Ed.2d 364 (1976); *Weise v. Syracuse Univ.*, 522 F.2d 397 (2d Cir. 1975) (employment discrimination); *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973) (free speech; distribution of

the addition of violent overt acts metamorphose the tort into a § 1985(3) cause of action.

Unlike *Griffin*, this case does not rest on the adequacy of notice pleading. The plaintiffs have had their day in court. They proved no conspiracy to prevent them from seeking the *equal* protection of the laws, or to deny them that protection, or to bar them from enjoying the *equal* rights, privileges, and immunities of citizens under the laws. Even if there is a "First Amendment right to associate with their fellow nonunion employees," slip op. page 15452, page —— *supra*, a question to which we will soon turn, it would not suffice to prove a conspiracy aimed at denying the plaintiffs this "right." Our colleagues, mistakenly we suggest, assume that "curtailment of [plaintiffs'] interests secured by the First Amendment is a deprivation of *equal* protection of the laws within the meaning of section 1985(3) as interpreted by *Griffin*." Slip op. page 15452, page —— *supra* (emphasis added). The mere deprivation of a right, however fundamental, is not a deprivation of *equal* protection. For a denial of equality to be the conspiratorial objective, the conspirators must seek to permit some persons to enjoy the protected right and to deny it to others. The reprobated objectives alleged in *Griffin* included, for example, the denial of the right of black persons to "'travel the public highways without restraint in the same terms as white citizens in Kemper County, Mississippi.'" 403 U.S. at 92, 106, 91 S.Ct. at 1793, 1800, 29 L.Ed.2d at 342, 350 (quoting the complaint). The proof in this case shows no comparable objective; the defendants did not seek to deny the right to work with nonunion workers to the individual plaintiffs *while according that right to others*.

B. The Right Found Protected by the Majority

Our colleagues interpret § 1985(3) to find that it protects a *constitutional* right of association, or more specifically, the *constitutional* right, first found to exist in this very opinion, of nonunion workers to work with other nonunion workers. This right is analogized to the right of political association. Protection for political association is thus expanded into protection for any kind of association having some economic community of interest. This seems to us to confuse the *right* protected with the *class of persons* protected. Although there is a constitutional right to refuse to work, no court, so far as we know, has ever previously found that workers have a constitutional right to work only with the kind of persons they choose to work with.

If nonunion workers have a constitutional right to work together, then the collective bargaining policy of the National Labor Relations Act is at least in part unconstitutional. Under it, nonunion workers have the right to join or not to join a union. 29 U.S.C. § 157. They have the right to vote against or for a union in a collective bargaining election. *Id.* If, however, a collective bargaining agent is chosen, the workers do not have a constitutional right to bargain individually or to work only with nonunion associates. They may be required to become union members thirty days after being hired, *id.* § 158(a)(3), unless the state has a "right to work" law.[39] Once an em-

campaign material); *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) (en banc) (free exercise of religion); *Richardson v. Miller*, 446 F.2d 1247 (3d Cir. 1971) (freedom of expression).

39. 29 U.S.C. § 164(b) ("Nothing in this sub-

ployer is ordered to bargain collectively, employees who are not union members are compelled to work with union members if they choose to work at all. Their employer certainly has no right to employ only nonunion labor—unless the National Labor Relations Act is unconstitutional.

This case does not involve the question whether a person has a right to join or not to join a union, to affiliate or not to affiliate with a political group, or to believe or disbelieve a creed. The desire to work for a nonunion employer cannot be escalated into a first amendment associational right. "What the [Supreme] Court has recognized as implicit in the first amendment . . . is a right to join with others to pursue goals independently protected by the first amendment—such as political advocacy, religious (regarded as a form of advocacy), or religious worship."[40] Although there is obviously some political content in union activity, nonmembership in a union is not a goal independently protected by the first amendment.

C. Discriminatory, Class-Based Animus

The majority does not hold Cross Construction to be a member of any class. We search the majority opinion in vain for something more than an ad hoc definition of the class to which the plaintiffs Scott and Matthews belong. After discussing the necessity of discriminatory class-based animus for two and one half pages, our colleagues state conclusorily, "the plaintiffs constitute a class for 1985(3) purposes."[41] They then discuss the labor union movement and the reputed kinship of economic views with political association, and state that "the plaintiffs were attacked because of their *economic*, rather than their political, association."[42] In the next sentence we are told that there was animus against the plaintiffs for their "nonunion association." The plaintiffs are later referred to as "nonunion employees" and, without noting the distinction, as "nonunion workers who are attacked for their choice to associate with other nonunion workers." Slip op. page 15459, page —— *supra*. It is difficult for us to divine exactly what class is described by these differing phrases, for the evidence makes it clear that Scott and Matthews were not attacked because they were not union members or because they wished to work with "other" nonunion members, but because they chose to work for Cross Construction, a firm that hired nonunion workers and did not pay union wages.[43] Scott was a supervisor and Matthews was a clerical worker. It has not been shown that either of them was even eligible for membership in any of the unions involved.

Let us assume, however, that the facts can be construed to make Scott and Mat-

chapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.").

Texas' Right to Work Law prohibits the denial of employment to anyone because of a failure to pay "any fee, assessment, or sum of money whatsoever" to a union. Tex.Rev.Civ.Stat.Ann. art. 5154a(8a) (Vernon 1971).

40. L. Tribe, American Constitutional Law § 12-23, at 702 (1978) (emphasis and footnotes omitted).

41. Slip op. pages 15455–15457, pages —— —— *supra*.

42. Slip op. page 15459, page —— *supra* (emphasis added).

43. Cross Construction hired the workers they needed without inquiring as to their union affiliation. In fact, some of the Cross Construction employees did belong to unions.

thews members of a class of persons who do not belong to a union and want to work with people who are also nonunion. This, we submit, is not a class protected by § 1985(3). The Supreme Court in *Griffin* said, "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action" to warrant § 1985(3) relief.[44] We have gone further and held that § 1985(3) forbids not only racial discrimination but the denial of equality to other classes:[45] those having common characteristics of an inherent nature; that is, classes accorded special protection by the equal protection clause of the fourteenth amendment and "the kinds of classes Congress was trying to protect when it enacted the Ku Klux Klan Act." *Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340, 347 & n.9 (5th Cir.) (en banc), *cert. denied*, — U.S. —, 102 S.Ct. 687, 70 L.Ed.2d 651 (1981).[46] The phrase "the kind of classes Congress was trying to protect" states a purely historical test, directing us to look to the purposes of the Ku Klux Klan Act when it was adopted. *Kimble* suggested as an illustration of classes in this category conspiracies based on the target's affiliation with a major political party. *Id.*

The majority opinion holds that, although the "[p]laintiffs are not a class normally afforded special protection under the equal protection clause merely because they wish to work nonunion," Slip op. page 15456, page —— *supra*, and although "Congress did not express a specific intent to protect nonunion employees in enacting the Ku Klux Klan Act, the legislative history demonstrates that the nonunion employees in this case comprised the kind of class Congress intended to protect," Slip op. page 15458–15459, page —— *supra*. We differ with this conclusion also.

The plaintiffs are, we submit, not members of a class at all,[47] but simply two individuals injured in the same assault. The majority agrees that not every conceivable grouping of persons capable of being defined as a class is protected by § 1985(3). Slip op. page 15456, page —— *supra*. Not only must the class share some common characteristic beyond simply being the victims of a conspiracy, but it must also be distinguishable from the general populace

44. 403 U.S. at 102, 91 S.Ct. at 1798, 29 L.Ed.2d at 348 (1971).

45. As the majority opinion points out, other circuits have also extended § 1985(3) to cover non-racial classes. Slip op. page 15455, page —— *supra*.

46. *See generally* Note, *The Class-Based Animus Requirement of 42 U.S.C. § 1985(c): A Suggested Approach*, 64 Minn.L.Rev. 635 (1980).

47. We note that in their amended complaint, the plaintiffs purported to represent a class of persons composed of four categories or subclasses of plaintiffs consisting of:

(a) All persons presently employed by A. A. Cross Construction Company, Inc. (hereinafter called "Cross"), their wives and children;

(b) All persons, together with their wives and children, who may become employed by Cross and perform work leading to construction of the Alligator Bayou Pump Station on the hurricane protection levee along Taylor's Bayou near Port Arthur, Jefferson County, Texas;

(c) All persons, their wives and children, and all firms and corporations who may supply, deliver, or provide labor, materials, goods or services to Cross or others for construction of the Alligator Bayou Pump Station;

(d) All persons, their wives and children, who may lawfully be present upon the site of the Alligator Bayou Pump Station, or the ways leading thereto.

Interestingly, we found no indication, in our examination of the record, of any attempt to have the class certified. Final judgment, therefore, was rendered only on behalf of the named plaintiffs.

by this characteristic. *Id.* These are but first steps, and do not enable us to define the § 1985(3) class, for many clearly defined and easily identifiable groups of persons who might be considered a "class" for some other purpose have been denied § 1985(3) class status: homosexuals,[48] tenant organizers,[49] debtors,[50] persons who file voluntary petitions in bankruptcy,[51] physicians who testify in malpractice suits,[52] injured workers who assert claims,[53] and trade association members.[54]

The majority looks to our en banc decision in *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977), for the gauge to measure whether the Scott-Matthews class is the kind of class Congress intended to protect when it enacted § 1985(3). They correctly recount the three reasons given in *McLellan* for holding that § 1985(3) does not cover persons who file voluntary petitions in bankruptcy.[55]

> First, the legislative history of the Ku Klux Klan Act contains no evidence of congressional concern about discrimination against persons who become insolvent. Second, while the protection afforded by the civil rights acts is not static, it would be inappropriate to enlarge the group of protected classes to include bankrupts when Congress had specifically declined to prohibit discrimination against them. Third, including bankrupts within the ambit of Section 1985(3) would be unwarranted in light of the Supreme Court's refusal to characterize the right to file a bankruptcy petition as a fundamental right.

Slip op. page 15457, page —— *supra*.

But, as our colleagues acknowledge, *McLellan* does not attempt to define what groups *are* and what groups are *not* § 1985(3) classes. *Id. McLellan* sets up only *some* of the criteria *for exclusion*. To determine that the present group is *included* as a § 1985(3) class because it is not one of those *excluded* by *McLellan* is to adopt the erroneous premise that all classes are comprehended except those barred for the same reason bankruptcy petitioners were eliminated by *McLellan*.

Furthermore, we believe that the majority's analysis of the *McLellan* factors is incorrect. The legislative history and, indeed, the popular name of the statute make clear the evil that was addressed, the Ku Klux Klan. Congress in 1871 was assuredly not trying to protect non-union workers, not only because it would not then have recognized the difference between union members and non-members but simply because the Klan posed no threat to such workers. The regional hostility the majority finds as a second identification for an appropriate class could scarcely embrace Cross Construction, a Texas corporation, Paul Scott, a resident of Texas, or James Matthews, also a resident of Texas at the time of the

48. *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979).

49. *Carchman v. Korman Corp.*, 594 F.2d 354 (3d Cir.), *cert. denied*, 444 U.S. 898, 100 S.Ct. 205, 62 L.Ed.2d 133 (1979).

50. *Lessman v. McCormick*, 591 F.2d 605 (10th Cir. 1979).

51. *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (en banc).

52. *Bricker v. Crane*, 468 F.2d 1228 (1st Cir. 1972), *cert. denied*, 410 U.S. 930, 93 S.Ct. 1368, 35 L.Ed.2d 592 (1973).

53. *Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340 (5th Cir. 1981) (en banc), *cert. denied*, —— U.S. ——, 102 S.Ct. 687, 70 L.Ed.2d 651 (1981).

54. *Arnold v. Tiffany*, 487 F.2d 216 (9th Cir. 1973), *cert. denied*, 415 U.S. 984, 94 S.Ct. 1578, 39 L.Ed.2d 881 (1974).

55. *McLellan*, 545 F.2d at 932-33.

incident. Nor does subsequently enacted federal labor legislation suggest that Scott and Matthews are members of a class protected by § 1985(3). That legislation expresses the national labor policy as encouraging collective bargaining. 29 U.S.C. § 102. Although Congress has recognized the "right to refrain from any or all such activities," *id.* § 157, it has never adopted a national labor policy protecting an individual's "right" to work for a nonunion employer. The right to belong or not to belong to a union is considerably different from the asserted "right" to work for a nonunion employer, for, as we have already seen, every employer whose activities affect interstate commerce and his employees are subject to the requirements of collective bargaining. *Id.* § 158(d). Finally, the kinship asserted by the majority to exist between economic and political association is a strange one, for in this country our political parties embrace the entire spectrum of economic classes.

If the class recognized by the majority includes, as we have supposed, persons who do not belong to a union and who want to work for an employer who hires other nonunion employees, there are yet other reasons not to accord such a class § 1985(3) protection. This class is one newly defined by this case, not one having any previous discernible jurisprudential identity. It is not a "class" marked by historical oppression, by minority status, by any social or political animus directed against it, by any political or religious belief, or by any of the indicia usually used to identify a class of persons who must be accorded special protection. The animus here was not directed at the membership of the plaintiffs in such a class or at their association together either as persons or in some anti-union group campaign, but at their *activities*: working without union membership for an employer who wished to hire them.

D. The Corporation as a Beneficiary of § 1985(3)

The majority rejects the view that Cross Construction is a member of the protected class.[56] They manage to find a § 1985(3) cause of action in favor of Cross Construction, however, by holding that the statute extends a remedy to *any person* injured by a forbidden conspiracy despite the fact that he is *not* within the protected class.[57] This view extends § 1985(3) protection to injured persons outside the protected class even if no member of that class has filed suit. By this reasoning, if, in the present case, a person had been injured by the negligence of the driver of one of the pickup trucks speeding from the scene of the attack, he would also be entitled to sue under the statute's aegis.

The Ninth Circuit has considered this reading of the statute and rejected it.[58] The only authority cited for the creation of

56. *Compare* Slip op. pages 15460–15461, pages —— - —— *supra with* the panel opinion, *Scott v. Moore*, 640 F.2d 708, 718 (1981) (the class composed of "nonunion workers and their employers . . . falls within the statute's protective ambit").

57. Slip op. pages 15460–15461, pages —— - —— *supra*.

58. *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711, 720-21 (9th Cir.) ("The law of this circuit is clear: the plaintiff must be a member of the class discriminated against to claim the benefits of § 1985(3)."), *cert. denied*, —— U.S. ——, 102 S.Ct. 510, 70 L.Ed.2d 383 (1981); *Briley v. California*, 564 F.2d 849, 858-59 (9th Cir. 1977); *Lopez v. Arrowhead Ranches*, 523 F.2d 924, 927 (9th Cir. 1975).

this penumbra is the dissenting opinion of Justice White in *Novotny*.[59]

The majority opinion in *Novotny* held, however, that § 1985(3) created no new rights but is remedial in nature, and rejected Justice White's view. The majority here finds a substantive cause of action in the statute for non-class members. This is not only, we submit, a misreading of the statute, but also a rejection of the authority by which we are bound.

E. The Constitutional Question: The Source of Congressional Power

The Supreme Court recognized in *Griffin* that § 1985(3), if applied literally to every situation apparently embraced by it, might in some applications exceed Congress's authority.[60] Therefore, as the majority opinion recognizes, "a source of congressional power must be identified to warrant application of the statute in each case."[61] Our colleagues accurately describe the controversy concerning "the extent to which section 5 of the Fourteenth Amendment grants Congress the power to reach wholly private conduct."[62] Pretermitting that issue, they find authority for the present application of § 1985(3) in the commerce power.[63]

Although the *power* of Congress under the commerce clause is broad enough to permit it to reach any private conspiracy

59. Novotny, a male, was a loan officer and member of the Savings and Loan Association's Board of Directors. He alleged that when he "expressed support for the female employees at a meeting of the board of directors, his connection with the Association abruptly ended." 442 U.S. at 370, 99 S.Ct. at 2347, 60 L.Ed.2d at 962. The en banc court of appeals for the Third Circuit held that Novotny was injured as a result of the conspiracy motivated by an invidious animus against women and had standing to bring suit under § 1985(c). 584 F.2d 1235, 1244-45 (3d Cir. 1978) (en banc). The Supreme Court majority did not, however, address this issue.

Justice White in his dissent stated: "Because § 1985(3) provides a remedy for *any person* injured as a result of deprivation of a substantive federal right, it must be seen as itself creating rights in persons other than those to whom the underlying federal right extends." 442 U.S. at 390, 99 S.Ct. at 2358, 60 L.Ed.2d at 975.

60. *Griffin v. Breckenridge*, 403 U.S. at 104, 91 S.Ct. at 1799, 29 L.Ed.2d at 349.

61. Slip op. page 15462, page —— *supra*.

62. Slip op. page 15462, page —— *supra*; *see* Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 Yale L.J. 1353, 1359 (1964); Wildman, *42 U.S.C. § 1985(3)—A Private Action to Vindicate Fourteenth Amendment Rights: A Paradox Resolved*, 17 San Diego L.Rev. 317 (1980); *A Construction of Section 1985(3)*, *supra* note 17, at 440; Note, *The Troubled Waters of Section 1985(3) Litigation*, 1973 Law & Soc.Ord. 639; Comment, *Private Conspiracies to Violate Civil Rights*, 90 Harv.L.Rev. 1721, 1722 n.11 (1977). *But see* Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 Colum.L.Rev. 449, 516-17 (1974).

Compare United States v. Guest, 383 U.S. 745, 783, 86 S.Ct. 1170, 1191, 16 L.Ed.2d 239, 263 (1966) (Brennan, J., concurring) *and Action v. Gannon*, 450 F.2d 1227, 1235 (8th Cir. 1971) (en banc) *with Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972) *and Retail Clerks Local 770 v. Retail Clerks Int'l Ass'n*, 359 F.Supp. 1285, 1287 (C.D.Cal.1973).

63. We would hold that the fourteenth amendment permits Congress to enact the statute if the statute is interpreted as we have suggested it should be: to provide a remedy for private conduct designed to deny a citizen equal protection of the laws because of his membership in a class that is protected by the fourteenth amendment. The class of persons who want to work for a nonunion employer, however, is not thus protected by the fourteenth amendment. We consider, therefore, the question whether Congress relied on the commerce clause in enacting the statute.

designed to affect interstate commerce,[64] Congress assuredly did not rely on the commerce clause in enacting § 1985(3). The statute does not invoke the commerce clause, nor does it distinguish between conspiracies that affect interstate commerce and those whose aim is solely intrastate.

The debates of the 1871 Congress focused on the constitutional power of Congress under the thirteenth, fourteenth, and fifteenth amendments. *Griffin* found congressional power also in the constitutional protection afforded interstate travel.[65] The Forty-Second Congress, accustomed to a narrow construction of the commerce clause[66] and seeking to reach conspiracies that denied equality whether or not interstate commerce was implicated, never considered the commerce clause as its authority.

When the Congress has relied upon the commerce clause, it has either defined the necessary commerce impact in the statute or given authority to an administrative agency to define the triggering amount of interstate commerce. Thus, in some instances, Congress has sought to reach every transaction "affecting" interstate commerce.[67] In other instances, Congress has exerted power only when there is a prescribed volume of interstate transactions.[68] There are no such indications of congressional intent here and no statutory guides for the quantum of interstate activity necessary to activate the statute.

The majority appears to assume that Congress intended to authorize a remedy for any conspiracy that might affect interstate commerce. The limits of that interstate impact must be spelled out by future decision. They also find authority to protect interstate workers, but that could scarcely justify application of the statute to Scott and Matthews, both of whom are Texans.

F. Reconfining the Genie

Recognizing implicitly that they have released a brand new federal tort, our colleagues attempt in dicta to enclose this genie in a larger bottle. They say that they would not extend § 1985(3) to *every* kind of unlawful conduct, only to the limited instance where "there is no campaign to organize employees *and* force or violence is used to stake out one group's territorial claim and to deprive other workers and

64. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119, 62 S.Ct. 523, 526, 86 L.Ed. 726, 732 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937).

65. 403 U.S. at 105, 91 S.Ct. at 1800, 29 L.Ed.2d at 350.

66. *E.g., United States v. Dewitt*, 76 U.S. (9 Wall.) 41, 19 L.Ed. 593 (1870) (invalidating federal statute because the commerce clause was a denial of power to interfere with internal trade and business of the States); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 19 L.Ed. 357 (1869) (holding insurance contracts not to be articles of commerce). "'Relatively little emerges up to the death of [Chief Justice] Waite in 1888, regarding the Court's attitude towards the commerce clause as an affirmative instrument for promoting "commerce among the states." The preoccupation [of earlier periods] is with the restrictive use of the clause.'" J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 134 (1978) (brackets in original) (quoting F. Frankfurter, The Commerce Clause Under Marshall, Taney and Waite 7 (1964) (first published 1937).

67. *See* cases cited in note 64 *supra*.

68. *E.g.*, 29 U.S.C. § 203(s) (Supp. IV 1980) (defining an enterprise engaged in commerce for purposes of the Fair Labor Standards Act as, *inter alia*, an enterprise whose annual gross volume of business is not less than $250,000).

their employer of the right to freely associate with one another."[69] We see no basis in the statute for distinguishing violent unlawful conduct from other kinds of unlawful activity such as unfair labor practices, secondary boycotts, and criminal libel, or, indeed, criminally reckless driving. The rationale of the decision cannot be thus confined save by ipse dixit. If the decision is based on principle, and not like Justice Robert's railway ticket, "good for this day and train only,"[70] it extends logically not only to a multitude of "classes" having some sort of economic or "associational" tie but protects each member of those classes against any kind of unlawful conduct that results in bodily injury, or even, perhaps, economic harm.

III. THE EVIDENTIARY QUESTION: STANDARD OF PROOF AND SUFFICIENCY OF EVIDENCE

The majority holds that the existence of a conspiracy on the part of some of the unions to interfere with the constitutional rights of the plaintiffs in this case can properly be established by a preponderance of the evidence. They conclude that, because no labor dispute existed, the clear proof standard required by § 6 of the Norris-LaGuardia Act should not be applied.[71] Part I of this opinion demonstrates that this case does involve a labor dispute within the meaning of the Norris-LaGuardia Act, thus compelling the application of the more rigorous standard of proof required by the Act.

Section 6 of the Act was added to overturn decisions holding unions liable in damages for the unlawful acts of their members, and members liable for the unlawful acts of other members.[72] The Act does not immunize unions from liability but it does protect them "against liability for unauthorized illegal acts" committed during a labor dispute except upon *clear proof* of authorization.[73] In *United Mine Workers v. Gibbs*, 383 U.S. 715, 737, 86 S.Ct. 1130, 1133, 16 L.Ed.2d 218, 234 (1966), the Supreme Court held that the clear proof standard applies even when federal courts are adjudicating claims against unions based on state law.[74]

Under *Gibbs*, an allegation that a union has adopted a strategy of violence and in-

69. Slip op. page 15461, page —— *supra* (emphasis added).

70. *Smith v. Allwright*, 321 U.S. 649, 669, 64 S.Ct. 757, 768, 88 L.Ed. 987, 1000 (1944) (Roberts, J., concurring).

71. Section 6 of the Norris-LaGuardia Act provides:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon *clear proof* of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

29 U.S.C. § 106 (emphasis added).

72. *United Bhd. of Carpenters & Joiners v. United States*, 330 U.S. 395, 404, 67 S.Ct. 775, 780, 91 L.Ed. 973, 983 (1947).

73. *Id.* at 404, 407, 67 S.Ct. at 780, 781, 91 L.Ed.2d at 983, 984.

74. The employer there had attempted to open a mine with miners belonging to a union rival of the United Mine Workers Union. Armed members of the UMW then forcibly prevented the opening of the mine, threatened the employer, and beat an organizer for the rival union. The mine was kept closed by peaceful picketing. Gibbs, the supervisor of the mine, sued for damages caused by the illegal activity. The Supreme Court held that damages flowing from the violence used to close the mine could be recovered under state law, but the Court specifically required use of the clear proof standard.

timidation to achieve labor goals is not sufficient to preclude application of the Norris-LaGuardia Act and its exacting standard of proof. As the Court there said, one of the central purposes of the Act is to insulate unions from liability for unauthorized violent sprees of the union membership. "The driving force behind § 6 . . . was the fear that unions might be destroyed if they could be held liable for damage done by acts beyond their practical control." *Id.* at 736–67, 86 S.Ct. at 1144, 16 L.Ed.2d at 233–34.

The Court today strips unions of the protection that Congress sought to give them when a violent act occurs in a conflict engendered because of an employer's labor policies. There was enough evidence to sustain, as not clearly erroneous, a finding by the fact trier under the preponderance of evidence standard that the unions were responsible for the assault. The unions were entitled, however, to have the clear proof standard applied.

This conclusion is not inconsistent with finding the unions guilty of unfair labor practices under the NLRA. To implement later-developed national labor policy, Congress adopted a different standard for cases arising under the NLRA—preponderance of the evidence, § 10(c), 29 U.S.C. § 160(c). This standard is also required in the limited situations in which private damage suits may be brought for violations of the NLRA, *see* § 301(e), 29 U.S.C. § 185(e). In all other instances, including those present here, the standard of the Norris-LaGuardia Act stands unmodified. The district court applied the wrong burden of proof and it follows inexorably that its decision must be reversed. We would go further and hold that the evidence was insufficient to warrant a finding of liability under the correct standard.

IV. CONCLUSION

This is not the kind of hard case that ought to lead us into making new law. Section 1985(3) was adopted to provide a federal forum for those who could find no redress in state courts. Today, the majority extend the statute to embrace conduct condemned by state law. State tort law offered adequate redress for the damages. Injunctive relief at private instigation was available in state court. State criminal law has prosecuted the offenders. Federal injunctive relief was obtained by federal administrative intervention. Neither indignation at criminal conduct nor sympathy for its victims should lead us to disregard the Norris-LaGuardia Act or misconstrue § 1985(3). Therefore, we respectfully dissent.

R. LANIER ANDERSON, III, Circuit Judge, dissenting:

I join Parts I and III of the dissent authored by Judges Rubin and Williams. Having thus concluded that the district court erred in granting the injunction (Part I) and that there is not sufficient evidence to support the judgment when tested under the proper standard of proof (Part III), I find it unnecessary to reach the very difficult issues discussed by Judges Rubin and Williams in Part II. While I probably agree that the evidence in this case did not establish the necessary "class-based, invidiously discriminatory animus," I have reservations concerning the broader implications of Part II of the dissent of Judges Rubin and Williams.

GARWOOD, Circuit Judge, dissenting.

I respectfully dissent and join in Parts II A ("The Nature of the Right for Which

§ 1985(3) Provides a Remedy") and II E ("The Constitutional Question: The Source of Congressional Power") of the dissenting opinion authored by Judges Rubin and Williams.

In my opinion, the phrase "equal privileges and immunities under the laws" in the first clause of section 1985(3) refers to those rights that the United States Constitution protects against interference by private action (as well as from impairment by state action), such as the right to be free of the badges of slavery as secured by the Thirteenth Amendment and the right to interstate travel. In other words, this phrase applies to rights that have no "state action" requirement. The majority concedes that such rights are not involved here. On the other hand, the phrase "the equal protection of the laws" in the first clause of section 1985(3), repeating verbatim the concluding words of Section 1 of the Fourteenth Amendment, would seem to refer to rights that the United States Constitution protects only against deprivation by some kind of state action or inaction. This is not to say that a private conspiracy cannot deprive a party of the equal protection of the laws; but the object of the conspiracy must be to, "directly or indirectly," in some manner bring about a situation where the *protection of the law* is unequally afforded or applied to the victim. I believe this construction accords with the wording of the Ku Klux Klan Act, with its title ("An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes"), and with both the operative intent and the constitutional understanding of those in the Forty-Second Congress who supported the Cook-Willard limiting amendment.

The overall purpose of this amendment was plainly to prevent the Act from becoming a kind of national tort law and to keep it from transgressing the perceived limitations on the power of Congress. While certainly one method of accomplishing this purpose was the imposition of a class based animus requirement, this was not the only method. The amendment also reflects its proponents' recognition that, with but few exceptions, the rights of citizens are protected by the United States Constitution only against governmental invasion. While with respect to such rights Section 5 of the Fourteenth Amendment was doubtless understood by the proponents of the Cook-Willard amendment as allowing Congress to prohibit private conduct designed to, directly or indirectly, deny the protection thus afforded by the United States Constitution, Section 5 was not understood as allowing Congress to change the ultimate nature of what the United States Constitution protected those rights against, namely governmental misfeasance or nonfeasance. This understanding is reflected, for example, in the remarks of Congressman Burchard, quoted in the opinion of Judges Rubin and Williams, Slip op. at 15479–15480, at —— *supra*, that the Act as amended condemned conspiracies

> "designed to prevent the equal and impartial administration of justice.... The gravamen of the offense is the unlawful attempt to prevent a State through its officers enforcing in behalf of a citizen of the United States his constitutional right to equality of protection."

As stated in *A Construction of Section 1985(c)*:[1]

1. Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U.Chi.L. Rev. 402 (1979).

"The language of *equal* protection and *equal* privileges and immunities was added as a limitation, not as an expansion. The fundamental congressional purpose was to prevent private conspiracies from taking over the government, or from affecting the political environment so as to inhibit state authorities from according equal protection to their citizens." *Id.* at 436. (Footnote omitted) (emphasis in original.)

While section 2 of the Ku Klux Klan Act also prohibits conspiracies "for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws," this clause is distinct from the "for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws" clause in at least two respects. The former clause refers to "all persons within such State," while the latter speaks of "any person or any class of persons." Moreover, the last-quoted clause has the expansive modifier "either directly or indirectly," while the first-quoted clause does not. As pointed out in this connection in *A Construction of Section 1985(c)*:

"It would be a mistake to read this legislative intent as limited to *direct* interference with government provision of equal protection.... The Ku Klux Klan was a political conspiracy; its depredations frequently involved no component of direct obstruction of officials. The Klansmen's object was to seize control of state governments, to reverse the process of reconstruction, and to nullify the rights recently conferred upon the freedmen by the thirteenth, fourteenth, and fifteenth amendments. Their primary weapon was political terror, directed especially against those whose votes and efforts sought to bring about just and impartial state administration. In this way they hoped to make it politically impossible for the states to accord equal protection. The moderates who drafted the statute were careful not to curtail the effect of the general clause of section 2 by words such as 'obstructing a governmental official.' Rather, they employed the phrase 'directly or indirectly' to insure that the statute would reach the schemes of conspirators designed to block equal protection by indirect and political means." *Id.* at 419–20. (Emphasis in original.)

In my opinion this analysis is not contrary to either the holding or the *ratio decidendi* of *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). The views expressed in this dissent are essentially those espoused in the concurring opinion of Justice Stevens, with which Justice Powell agreed, in *Great American S. & L. Assn. v. Novotny*, 442 U.S. 366, 99 S.Ct. 2345, 2353, 60 L.Ed.2d 957 (1979) (Stevens, J., concurring). Neither Justice Stevens nor Justice Powell appear to consider their views in this regard as being at variance with *Griffin*, nor does the majority opinion in *Novotny* indicate that these concurrences misread *Griffin*. Indeed, the statement by the *Novotny* majority that "[s]ection 1985(c) provides no substantive rights itself," 442 U.S. at 372, 99 S.Ct. at 2349, 60 L.Ed.2d 963, supports the analysis here made, namely that the Forty-Second Congress designed the Ku Klux Klan Act to guard against subversion of those rights secured to citizens by the United States Constitution. It did not create new substantive rights.

Moreover, I believe the appropriate reading of *Griffin* is that stated as follows in *A Construction of Section 1985(c)*:

"The Court's decision that the acts alleged in *Griffin* stated a section 1985(c) cause of action accords with the original purpose of the statute. The defendants in *Griffin* assaulted the plaintiffs on the highway on the mistaken impression that the driver was a civil rights worker. There was no hint of state action in any of the three possible forms: no state officers were involved by action or inaction, no state authorities were coerced, influenced, or impeded in the performance of their duty toward the plaintiffs, and no conspiracy existed so massive as to supplant state authority. Nevertheless, the purpose of the defendants was in part to drive civil rights workers from the state, and thereby to make it less likely politically that the state would carry out its duty of equal protection to blacks. This purpose falls squarely within the scope of conspiratorial designs that prompted the Forty-Second Congress to pass the Ku Klux Klan Act.

". . . .

". . . The Court's holding does not suggest that conspiracies of a wholly different purpose and effect from those motivating the framers of the statute—for example, private acts of discrimination in employment—are also within the statute's reach. The *Griffin* Court insisted as much by expressly recognizing the necessity of 'giving full effect to the congressional purpose' by restricting the scope of the action in the manner intended by the sponsors of the 'limiting amendment.' In order to decide the *Griffin* case, it was not necessary to explore the *full* extent of the limiting amendment—the requirement of discriminatory animus sufficed for *Griffin's* purposes—but the opinion endorses, in principle, the restriction of section 1985(c) in accordance with its extensive legislative history." *Id.* at 425–27. (Footnotes omitted) (emphasis in original.)

In this case there is not only no evidence that these defendants had the purpose of denying plaintiffs any of those rights that the United States Constitution secures against private (or public) abridgement (such as the right to be free of the badges of slavery or to travel interstate), but there is also no evidence of any purpose to directly or indirectly deny plaintiffs the *protection of any laws*. There not only was no direct interference with law enforcement, there was no suggestion that defendants were attempting to prevent plaintiffs from exercising or achieving any political influence or governmental power or to create a climate of opinion or situation in which governmental authorities would be unwilling or unable to protect plaintiffs in the exercise of their legal rights or to afford plaintiffs equal governmental treatment or protection.

Nor, in my view, has there been any showing of the requisite class based animus. While I agree with the majority that a purely racial animus is not the only class based animus reached by the Ku Klux Klan Act, I nevertheless believe that the animus reflected in this case is far removed from that which the Act intended to protect against. As one of the above-quoted passages from *A Construction of Section 1985(c)* correctly observes:

"The klansmen's object was to seize control of state governments, to reverse the process of reconstruction, and to nullify the rights recently conferred upon the freedmen by the thirteenth, fourteenth and fifteenth amendments. Their primary weapon was political terror, directed especially against those whose votes

> and efforts sought to bring about just and impartial state administration."

The Ku Klux Klan Act, of course, was designed to combat such phenomenon. Consistent with this evident design, I would require that the animus, whether directed at individuals or a class, be related in some manner to race (or perhaps some other analogously immutable class characteristic). Under this theory, the Act would also extend to those harmed either because of their actual or perceived, present or potential, allegiance with a discriminated-against race (or similar class) or because of their efforts to secure on behalf of such race (or similar class) the rights which the United States Constitution guarantees against governmental denial on account of race (or similar characteristic) or the rights, such as freedom from the badges of slavery, which the United States Constitution protects against private infringement.

I do not denigrate the right of individuals not to belong to unions, nor do I suggest that the right to work on a job not restricted to union members is unworthy of protection against unlawful interference. And, I cannot accept the proposition that there has been no significant discrimination or violence against nonunion workers. But it is plain to me that this was not the sort of discriminatory deprivation of rights that the Ku Klux Klan Act was designed to prevent.

I also agree with Judges Rubin and Williams that, for the reasons stated by them, the majority errs in its reliance on the commerce clause as a source of congressional power to enact the Ku Klux Klan Act, so as to reach purely private conspiracies directed at purely private ends unrelated to rights protected by the United States Constitution. Such reliance at least indirectly undermines the majority's reading of congressional intent concerning the scope of section 1985(3). At the very least, reliance on the commerce clause bespeaks a serious doubt as to the existence of any other source of congressional power sufficient to support the Ku Klux Klan Act as interpreted by the majority. We are cited to no legislative history, or other contemporary evidence, that Congress intended to invoke its power under the commerce clause, and it is beyond dispute that congressional power under this clause was then considered far more limited than it is today. Accordingly, since Congress did not purport to act under the commerce clause and yet considered it was acting constitutionally, a strong inference arises that Congress did not intend the Ku Klux Klan Act to have the broad reach ascribed to it by the majority.

Moreover, we are cited to no decision of the Supreme Court that has sustained under the commerce clause an act of Congress not by its terms directed at interstate or foreign commerce, or matters affecting them, or expressly stated to be enacted pursuant to the power to regulate commerce. To do so when the legislative history, and other contemporary evidence, plainly indicate that Congress was relying on other constitutional sources of power, seems to me to be a most serious error. To regulate only conduct in or affecting interstate commerce is quite a different proposition from regulating conduct irrespective of its relation to interstate commerce. Under Section 8 of Article I, it is Congress, not the courts, that is given the "power" "to regulate commerce." When the courts "sustain" under the commerce clause an act of Congress plainly *not* intended as an exercise of the power to regulate commerce, an act *not* limited to conduct in or affecting commerce but rather applying equally to conduct

within and without the scope of the commerce power, then the courts have made the decision, which the Constitution committed to Congress, to regulate interstate commerce. The majority relies on Chief Justice Marshall's classic formulation in *McCulloch v. Maryland*, 4 Wheat 316, 421, 4 L.Ed. 579, 605 (1819), but overlooks the import of the opening phrases, "Let the end be legitimate, let it be within the scope of the constitution...." Here, the "end" which Congress sought to achieve was *not* the regulation of commerce. It stands *McCulloch v. Maryland* on its head to say that an "end" not intended by Congress, and which Congress was not required to intend, can be used to sustain, and in sustaining to transform, an act of Congress taken in the exercise of distinctly different constitutional powers.

Concluding, for the above-referenced reasons, that plaintiffs have no cause of action under 42 U.S.C. § 1985(3), I find it unnecessary to reach the other issues addressed in the majority opinion and in the dissent of Judges Rubin and Williams.

APPENDIX B

Paul E. SCOTT et al., Plaintiffs-Appellees,

v.

Bill MOORE et al., Defendants,

Laborers International Union of North America, Local No. 870 et al., Defendants-Appellants,

International Union of Operating Engineers, etc., AFL-CIO, Local 450, Defendant-Appellant.

No. 79-1196.

United States Court of Appeals, Fifth Circuit.

March 26, 1981.

Construction company and two of its employees brought action against trades council, its unions, and individual union members, alleging that defendants conspired for purpose of depriving plaintiffs of equal protection of the laws and equal privileges and immunities under the law when they planned and executed an attack on construction site. The United States District Court for the Eastern District of Texas, Joe J. Fisher, J., entered judgment in favor of plaintiffs, and defendant appealed. The Court of Appeals, Charles Clark, Circuit Judge, held that: (1) anti-injunction provisions of Norris-LaGuardia Act did not deprive district court of jurisdiction to enjoin violence; (2) civil rights conspiracy statute encompassed conspiracy designed to deprive nonunion workers and their employer of First Amendment right to freely associate with one another where conspiracy did not occur in conjunction with legitimate union activity and it was perfected by force and violence; (3) commerce clause empowered Congress to reach the private conspiracy; (4) unions were not involved in a "labor dispute" and thus clear proof standard of Norris-LaGuardia Act did not apply, and (5) district court's findings that three union locals authorized or participated in the conspiracy were not clearly erroneous, but evidence of participation in conspiracy was insufficient with respect to other eight unions.

Affirmed in part and reversed in part.

1. Labor Relations ⇐855

Norris-LaGuardia Act was passed for the purpose of limiting circumstances and conditions under which injunctive action could be taken against labor organizations in the context of a labor dispute; Act was predicated on the conviction that labor disputes turn on issues of social and economic policy that cannot appropriately be resolved by the courts. Norris-LaGuardia Act, §§ 1 et seq., 5, 29 U.S.C.A. §§ 101 et seq., 105.

2. Labor Relations ⇐866, 867

Norris-LaGuardia Act does not deny to federal courts power to enjoin violence, breaches of the peace, or criminal acts simply because they may be committed by persons participating or interested in a labor dispute. Norris-LaGuardia Act, §§ 4, 5, 7, 7(a), 29 U.S.C.A. §§ 104, 105, 107, 107(a).

3. Labor Relations ⇐870

Norris-LaGuardia Act did not deprive district court of jurisdiction to order trades council, 24 of its union members, and individual coconspirators not to combine, conspire, threaten, intimidate, assault, or commit any act of violence toward or upon any person, property or

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possession of any person or his family who may work upon, travel to, deliver materials, goods or services to nonunion employer or employer's construction site. Norris-LaGuardia Act, §§ 4, 5, 7, 7(a), 29 U.S.C.A. §§ 104, 105, 107, 107(a).

4. Conspiracy ⇐7.5

Five elements necessary for a plaintiff to establish cause of action under civil rights conspiracy statute are: (1) that defendants must conspire or go in disguise on highway or premises of another; (2) for the purpose of depriving any person or class of persons of equal protection of the laws or of equal privileges and immunities under the laws; (3) one or more of the conspirators must commit some act in furtherance of the conspiracy; (4) whereby another is either (a) injured in his person or property or (b) deprived of having and exercising any right or privilege of a citizen of the United States; and (5) conspirators' conduct must be unlawful independent of violation of civil rights conspiracy statute. 42 U.S.C.A. § 1985(3).

5. Constitutional Law ⇐274.1(1)

Guarantees afforded by First Amendment are protected by due process clause of Fourteenth Amendment. U.S.C.A.Const. Amends. 1, 14.

6. Constitutional Law ⇐91

Right of free association is closely aligned with right of free speech and is similarly protected by First Amendment. U.S.C.A.Const. Amend. 1.

7. Conspiracy ⇐7.5

Civil rights conspiracy statute was intended to provide remedy for entirely private conspiracies. 42 U.S.C.A. § 1985(3).

8. Conspiracy ⇐7.6

Civil rights conspiracy statute can, under certain circumstances, afford remedy for purely private conspiracies aimed at denying their victims the First Amendment right of free association. U.S.C.A.Const. Amend. 1; 42 U.S.C.A. § 1985(3).

9. Conspiracy ⇐7.6

Civil rights conspiracy statute is not restricted to protecting victims of racial discrimination but, rather, includes conspiracy motivated by nonracial class animus. 42 U.S.C.A. § 1985(3).

10. Conspiracy ⇐7.6

Civil rights conspiracy statute encompasses conspiracy designed to deprive nonunion workers and their employer of the First Amendment right to freely associate with one another where the conspiracy does not occur in conjunction with legitimate union activity and is perfected by force and violence. 42 U.S.C.A. § 1985(3).

11. Conspiracy ⇐7.5

Not every conceivable class of persons is covered by civil rights conspiracy statute; members of plaintiff class must share some common characteristics beyond simply being victims of defendant's conspiratorial conduct, and class cannot be so large and amorphous that its members are virtually indistinguishable from the vast majority of the populace. 42 U.S.C.A. § 1985(3).

12. Conspiracy ⇐7.6

Plaintiffs, nonunion employer and its nonunion employees who alleged injury resulting from conspiracy motivated by defendants' hostility toward nonunion workers and employers who hire them,

constituted a class under civil rights conspiracy statute. 42 U.S.C.A. § 1985(3); National Labor Relations Act, §§ 1 et seq., 7, 8(b)(1) as amended 29 U.S.C.A. §§ 151 et seq., 157, 158(b)(1).

13. Conspiracy ⇐7.6

Civil rights conspiracy statute cannot be invoked to disrupt operation of carefully integrated statutory scheme, nor can cause of action under statute be predicated upon simple unfair labor practice; unionism or nonunionism in and of itself does not create a covered class under statute, but where there is no campaign to organize employees and force or violence is used to deprive nonunion workers and their employer of a right to freely associate with one another, action will lie under civil rights conspiracy statute. 42 U.S.C.A. § 1985(3).

14. Commerce ⇐74.65

Commerce clause justified application of civil rights conspiracy statute to defendants' conspiracy, which was motivated by hostility against nonunion employees and their employer where employer was general contractor which, during year preceding violent attack on its construction site had performed work outside of Texas valued in excess of $300,000, where employer had purchased over $50,000 worth of goods and materials which originated outside of Texas and where construction contract was with United States Army Corps of Engineers, even though volume of business done outside of Texas was small compared to total amount of services and goods in interstate commerce. 42 U.S.C.A. § 1985(3); U.S.C.A.Const. Art. 1, § 8, cl. 3.

15. Commerce ⇐3

Under commerce clause, judicial inquiry is limited to asking whether Congress has rational basis for finding chosen regulatory scheme necessary to the protection of commerce; it is not constitutionally relevant that Congress was actually legislating against moral wrongs when it enacted provisions in question. U.S.C.A.Const. Art. 1, § 8, cl. 3.

16. Labor Relations ⇐766

Under Norris-LaGuardia Act section providing that no officer or member of union and no union participating in or interested in labor disputes shall be held liable for unlawful acts of individual officers, members or agents without clear proof of actual participation in or actual authorization of such acts or ratification thereof after actual knowledge thereof, Congress intended to require clear, unequivocal and convincing proof of union involvement in unlawful conduct to impose liability for it. Norris-LaGuardia Act, § 6, 29 U.S.C.A. § 106.

17. Labor Relations ⇐766

While Norris-LaGuardia Act section requires prior to imposition of liability as to union clear and convincing evidence as to union authorization of, participation in, or ratification of acts allegedly performed by its members, it does not prescribe different standard of proof for other issues in actions against union or its officers or members involved in a labor dispute. Norris-LaGuardia Act, § 6, 29 U.S.C.A. § 106.

18. Statutes ⇐184, 208

In construing any congressional enactment, it is necessary to interpret meaning of words as they are used in relation to setting in which they are written, with due regard to mischief which legislation was designed to remedy.

19. Labor Relations ⇐766

Where, at time defendants allegedly conspired to attack construction site, no union had collective bargaining agreement with employer and none was seeking recognition as collective bargaining representative, and no union was staging an informational picket to publicize employer's employment practices, and where attack on construction site was not associated with any ongoing legitimate union conduct, unions were not participating in a "labor dispute," and thus clear proof standard of Norris-LaGuardia Act did not apply in suit against unions. Norris-LaGuardia Act, § 6, 29 U.S.C.A. § 106.

See publication Words and Phrases for other judicial constructions and definitions.

20. Labor Relations ⇐881

Under Norris-LaGuardia Act, a "labor dispute" exists where unlawful conduct occurs in conjunction with some legitimate union activity, and "labor dispute" may also exist even though otherwise legitimate union conduct is unlawful under some other statutory scheme. Norris-LaGuardia Act, § 6, 29 U.S.C.A. § 106.

21. Federal Courts ⇐858

In suit brought under civil rights conspiracy statute against various unions and others arising out of an attack on plaintiffs' construction site allegedly motivated by hostility against nonunion employer and its employees, district court's finding of involvement in conspiracy was clearly erroneous with respect to certain unions, whose only contact with assault on construction site was their attendance at trades council meeting prior to the assault, but finding was not clearly erroneous with respect to three union locals, in view of evidence connecting union business representatives to the attack on the construction site. 42 U.S.C.A. § 1985(3).

22. Federal Courts ⇐852

Where "clearly erroneous" standard applies, appellate court must be especially reluctant to disregard factual finding based upon evaluation of testimony that draws credibility into question; it may not consider the evidence anew, and merely because it might have reached a different result on the same evidence will not justify its setting district court's findings aside. Fed.Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

Appeals from the United States District Court for the Eastern District of Texas.

Before CHARLES CLARK, TJOFLAT and GARZA, Circuit Judges.

CHARLES CLARK, Circuit Judge:

This appeal presents important questions concerning the scope of relief available under 42 U.S.C. § 1985(3), the extent of congressional power to enact a civil remedy for wholly private infringement of constitutional rights, and the relationship between section 1985(3) and the labor relations laws. The district court issued a permanent injunction against the defendants, including numerous labor organizations. It also awarded money damages for violations of section 1985(3), concluding that the statute afforded a remedy for the kind of private conspiracy involved here and that Congress was constitutionally empowered to provide such a remedy. For the reasons stated below, we affirm in part and reverse in part.

I. THE FACTUAL BACKGROUND

This case arises out of an episode of mob violence that occurred in the early morning hours of January 17, 1975. The plaintiffs are A. A. Cross Construction Company, Inc., and two of its employees, Paul Scott and James Matthews. The defendants include the Sabine Area Building and Construction Trades Council, a loose confederation of craft and construction unions located in the Port Arthur, Texas, area. Also named as defendants are twenty-five of the Council's member unions and several individual members of some of these labor unions. The individual defendants are not parties to this appeal. The plaintiffs contend that the defendants conspired for the purpose of depriving them of the equal protection of the laws and equal privileges and immunities under the law when they planned and executed an attack on the Cross construction site, assaulting workers and destroying property.

A. A. Cross Construction Company is a Texas corporation engaged in the building and construction industry as a general contractor. In May, 1974, Cross contracted with the Department of the Army, United States Corps of Engineers to erect the Alligator Bayou Pumping Station and Gravity Drainage Structure on the hurricane levee along Taylor's Bayou near Port Arthur. The agreement had a contract price in excess of $8 million and called for the construction of the pump station with four pumps and a gravity drain for flood control. In accordance with its customary practice, the Cross Construction Company hired its workers for the Alligator Bayou project without regard to union affiliation, employing persons solely on the basis of its own need for the applicant's occupational skills. Cross did not have a collective bargaining agreement with any labor union, and when this incident occurred no union was seeking to organize the company's employees. In addition, Cross often hired workers from outside the Port Arthur community.

Cross Construction Company's hiring practices provoked an antipathetic response from some segments of the Port Arthur community. In fact, on several occasions prior to the eruption of violence on January 17, popular enmity had risen to the level of warnings and threats directed against Cross and its employees. Local residents had confronted Cross employees at a local tavern and pool hall frequented by them, threatening to place pickets at the construction site, promising to make Cross "go union," and occasionally warning of trouble if Cross did not cease hiring nonunion laborers. About three months before the January 17 attack, one of the individual defendants, Bill Moore, approached Mr. Cross and threatened that he would "hurt you bad," saying, "What is going to happen when that big rig of yours down there burns up?" On another occasion, John Wallace, financial secretary and business representative for the Carpenters Local # 610, had told Cross that "this is union country" and that if he persisted in using nonunion labor it was "going to cost you a million dollars."

Meanwhile, during the months preceding the January 17 violence, rumors began to develop concerning a "citizens protest" to be staged at the Alligator Bayou construction site. These rumors contemplated a public demonstration to call attention to the fact that Cross hired nonunion labor and did not have a labor contract with any union as well as to protest the company's policy of hiring employees from outside the Port Arthur community.

There is no direct evidence to show the organizing force behind the protest demonstration, but on Wednesday, January 15, two days before the assault on the Cross jobsite, the Sabine Area Building Trades Council held its regular weekly meeting. Cross Construction Company's indifference to prospective employees' union status and its lack of a union contract had long been topics of concern at the Council's meetings, and they were once again discussed during the January 15 session. In addition, the group discussed the rumored citizens protest, and some of the union representatives in attendance informed the Council that the demonstration had apparently been scheduled for the following Friday.

On Thursday, the sixteenth, Cross Construction Company learned of the scheduled protest from two union employees associated with the Alligator Bayou project. Fred Dukes, a member of Cement Masons Local 884, worked for Cross as a cement finisher on a two-day job. Earl Stevens, a member of Plumbers Local 504, worked as a foreman for Cross Construction Company's mechanical subcontractor. Both men received warnings from their respective union business agents about a possible picket or demonstration to be held at the Cross construction site, and both men passed that information along to Cross. Neither Dukes nor Stevens had heard anything about violent or destructive conduct. Nevertheless, Cross directed its employees to report for work at 6:00 a. m. on Friday, an hour earlier than usual, in order to avoid any confrontation between them and the demonstrators.

On the morning of January 17, after most of the Cross employees had arrived at work, a crowd of nearly three hundred people assembled at the main access road leading to the Cross construction site. Several vehicles made brief forays up the access road, and their occupants confirmed with Cross and Scott that they were at the Cross Construction Company jobsite. The crowd began to get unruly, pushing and shoving the remaining Cross workers as they arrived. Nevertheless, Cross's employees began work as usual. Then, shortly after 7:00 that morning, a group of four pickup trucks, each carrying between twelve and eighteen persons, emerged from the crowd gathered at the access road and drove onto the jobsite. Plaintiff Scott went out to meet the intruders and to request them to leave the area, but one of them approached Scott and said, "Man, you all have got to be crazy . . . this is a union town." Scott told his interlocutor that they did not want any trouble, and he attempted to gather together the other employees and to leave the jobsite. However, before he could complete his mission, someone stepped out of the group and struck him on the head. Suddenly, the mob swarmed over the construction site, brutally beating Cross and his employees with iron rods and wooden boards, overturning and setting fire to the trailer that served as the construction site office, smashing automobile and truck windshields, and vandalizing company tools and equipment. The entire episode lasted only a few minutes, but the destruction was devastating. Cross and his employees were treated for their injuries at a local hospital, and work at the construction site did not resume for nearly three weeks. Some of Cross's employees, frightened by the possibility of repeated attacks at the jobsite, refused to return to work. In addition, the violence and vandalism delayed the completion of the project by about six months, ultimately causing the Cross Construction Company to default in its contractual obligation to the U. S. Army Corps of Engineers.

On January 31, 1975, plaintiffs Scott and Matthews initiated this lawsuit against the individual defendants. They sought and obtained a temporary injunction retraining the then-named defendants and "all persons, firms, and associations combining or conspiring with defendants" from further violent, intimidating, or destructive acts against employees at the Alligator Bayou Pump Station project. Nearly two years later, the plaintiffs amended their complaint, adding A. A. Cross Construction Company, Inc., as plaintiff and the Sabine Area Building and Construction Trades Council along with twenty-five local unions as defendants. The district court found that the plaintiffs had proved a conspiracy to deprive them of the equal protection of the laws, permanently enjoined the building trades council and twenty-four of the unions from future misconduct, and assessed damages against eleven of the union defendants.[1]

II. THE JURISDICTIONAL QUESTION: INJUNCTIVE RELIEF AND THE NORRIS LAGUARDIA ACT

The district court issued a permanent injunction against the Sabine Area Building and Construction Trades Council, twenty-four of its member unions, and all persons conspiring with them. The court's injunction ordered that those parties subject to its terms

> . . . shall not hereafter combine, conspire, threaten, intimidate, assault, or commit any act of violence toward or upon any person, property or possession of any person or his family who may work upon, travel to, deliver materials, goods, or services to A. A. Cross Construction Co., Inc., or to the site of the alligator Bayou Pump Station on Taylor's Bayou near Port Arthur, Jefferson County, Texas.

The defendants contest the district court's power to issue such an injunction, arguing that the Norris-LaGuardia Act deprives the district court of jurisdiction to enjoin labor organizations from engaging in conspiratorial conduct. They maintain that the unembellished language of the Act is sufficient to show the court's usurpation of authority.

[1] We disagree. The Norris-LaGuardia Act was passed for the purpose of limiting the circumstances and conditions under which injunctive action could be taken against labor organizations in the context of a labor dispute. The labor injunction had been an important device used by employers to counter organized labor's most effective economic weapons, strikes, boycotts, and picket lines. However, the Act was predicated on the conviction that labor disputes turned on issues of social and economic policy that could not appropriately be resolved by the courts. The legislative solution to

1. The district court assessed damages against the following eleven unions: Laborers International Union of North America, Local 870; Operative Plasters and Cement Masons International Association, Local 884; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 195; United Brotherhood of Carpenters and Joiners of America, Local 610; United Brotherhood of Carpenters and Joiners of America, Local 753; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL-CIO, Local 587; International Association of Bridge Structural and Ornamental Ironworkers, Local 125; Sheet Metal Workers International Association, Local 196; Carpenters District Council of Sabine Area; International Brotherhood of Electrical Workers, Local 479; and International Union of Operating Engineers, Hoisting and Portable Engineers, AFL CIO, Local 450.

the problems confronting workers in a complex industrial economy was union organization and collective bargaining. Since the ready issuance of labor injunctions presented a serious obstacle to the concerted activities of organized workers, Congress decided to remove the federal judiciary from labor disputes. Thus, section 5 of the Act, 29 U.S.C. § 105, limits the equitable power of the federal courts in the following way:

> No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title.

29 U.S.C. § 105.

[2] But the Act does not impose an unqualified prohibition against federal injunctive relief. Section 105 merely restricts the court's power to enjoin concerted or conspiratorial activity where the conduct to be enjoined is an act enumerated in section 104.[2] The enumerated acts include refusing to work, joining a labor organization, paying or withholding strike benefits from a labor disputant, lawfully giving aid to a labor disputant who is prosecuting or defending a court action, truthfully and peacefully publicizing a labor dispute, peacefully assembling to promote one's interests in a labor dispute, and agreeing with or inducing other persons to do any of those acts. In short, section 104 interdicts injunctive relief against the legitimate activities of labor unions. However, there is nothing in this provision denying to federal courts the power to enjoin violence, breaches of the peace, or criminal acts simply because they may be committed by persons participating or interested in a labor dispute.

[3] In fact, the Norris-LaGuardia Act itself implicitly recognizes the threatened

2. Section 104 provides as follows:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
>
> (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
>
> (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

29 U.S.C. § 104.

commission of violent acts as a condition under which an injunction may issue. Section 107 states that no court of the United States has jurisdiction to grant an injunction, unless, after a hearing, the court finds "[t]hat unlawful acts have been threatened and will be committed unless restrained . . ." 29 U.S.C. § 107(a). Thus, violence, intimidation, threats, vandalism and combinations or conspiracies to commit such acts may be restrained and enjoined even though they arise in connection with a labor dispute. *See, e. g., Westinghouse Broadcasting Co. v. Dukakis*, 412 F.Supp. 580 (D.Mass. 1976); *Potomac Electric Power Co. v. Congress of Racial Equality*, 209 F.Supp. 599 (D.D.C.1962). The Norris-LaGuardia Act does not divest the district court of jurisdiction to enjoin the kind of violent conduct present in this case.[3]

III. THE STATUTORY QUESTION: THE SCOPE OF REMEDY UNDER 42 U.S.C. § 1985(3)

A. *Griffin v. Breckenridge*

Section 1985(3) was originally enacted by Congress as a part of the Ku Klux Klan Act in order to enforce the Civil War amendments to the Constitution and to provide a means of redress for persons victimized by the Klan's acts of terror and intimidation. The statute imposes civil liability on persons conspiring to deprive another person or class of persons of "the equal protection of the laws, or of equal privileges and immunities under the laws."[4] Narrow judicial construction made section 1985(3) a seldom-used remedy during the first century after its enactment. *See, e. g., Collins v. Hardyman*, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253 (1951). However, the Supreme Court decided in 1971 to "accord to the words of the statute their apparent meaning" and held section 1985(3) provided a civil remedy for damages against wholly private infringements of constitutionally protected rights. *Griffin v. Breckenridge*, 403 U.S. 88, 97, 91 S.Ct. 1790, 1795, 29 L.Ed.2d 338, 345 (1971). In *Griffin*, a group of whites assaulted three black men along a Mississippi highway in the mistaken belief that their victims were the associates of a civil rights worker. The blacks brought an action under section 1985(3) to redress violations of the laws of the United States and of Mississippi, including the rights of free speech, assembly, association, interstate travel, liberty, and security of their persons. The Supreme Court first held that the text of the statute, recent judicial inter-

3. Even where jurisdiction to grant injunctive relief is authorized, the Norris-LaGuardia Act imposes strict procedural requirements upon the court. *See* 29 U.S.C. §§ 107 109; *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 561 62, 58 S.Ct. 703, 707, 82 L.Ed. 1012, 1016 (1938). The unions have raised no objections to the procedures employed by the district court in this case.

4. The relevant part of section 1985(3) reads as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class or persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3)

pretations given to related civil rights provisions, the complementary relationship of the various civil rights statutes, and the legislative history surrounding section 1985(3) all "point unwaveringly to § 1985(3)'s coverage of private conspiracies." 403 U.S. at 101, 91 S.Ct. at 1798, 29 L.Ed.2d at 347.

[4] While eliminating the state action requirement, the *Griffin* court was concerned that the statute, if applied too broadly, would displace many areas of tort law that have traditionally been reserved to the states and thereby violate constitutionally-based principles of federalism. "That the Statute was meant to reach private activity does not . . . mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others." 403 U.S. at 101, 91 S.Ct. at 1798, 29 L.Ed.2d at 347. Accordingly, the Court read section 1985(3) to apply only to actions which are inspired by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." 403 U.S. at 102, 91 S.Ct. at 1798, 29 L.Ed.2d at 348. It then delineated four elements necessary for a plaintiff to establish a § 1985(3) cause of action:

> (1) the defendants must conspire or go in disguise on the highway or premises of another;
>
> (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and
>
> (3) one or more of the conspirators must commit some act in furtherance of the conspiracy; whereby
>
> (4) another is either (a) injured in his person or property or (b) deprived of having and exercising any right or privilege of a citizen of the United States.

See id. at 102-03, 91 S.Ct. at 1790, 29 L.Ed.2d at 348. Subsequently, this court has added a fifth element,

> (5) that the conspirators' conduct must be unlawful independent of the section 1985(3) violation.

See McLellan v. Mississippi Power & Light Co., 545 F.2d 919 (5th Cir. 1977) (en banc).

The *Griffin* court, having concluded that the plaintiffs had stated a cause of action under section 1985(3), then sought to locate a source of congressional power to reach the private conspiracy alleged. The sources identified in *Griffin* were the Thirteenth Amendment and the constitutional right to travel. 403 U.S. at 104-06, 91 S.Ct. at 1799-1800, 29 L.Ed.2d at 349-50. The Court observed, however, that other provisions of the Constitution, including section 5 of the Fourteenth Amendment, might empower Congress to reach other conspiracies by private persons. *Id.* at 107, 91 S.Ct. at 1801, 29 L.Ed.2d at 351. However, the Court found the facts of that case made it unnecessary to look beyond the Thirteenth Amendment and the right to interstate travel.

B. *The Present Case*

Griffin's principles indicate the plaintiffs here have made out a cause of action under section 1985(3). The facts of this case clearly embody four of the five elements essential to a successful § 1985(3) claim. First, the evidence is sufficient to establish a conspiracy among some of the Council's constituent unions and individual defendants. Second, proof that plaintiffs were assaulted, beaten, and threatened and that property was destroyed establishes the requisite "act in furtherance" of the conspiracy. Third, these

acts are indisputably illegal apart from § 1985(3) as required by *McLellan*. Fourth, there is evidence of personal injuries, property damage, and economic loss. The only element requiring analysis is the requirement that the conspiracy be for the purpose of depriving a person of the equal protection of the laws or equal privileges and immunities under the laws. This requirement, in turn, has two components: (1) the violation of some protected right and (2) a class-based, invidiously discriminatory animus motivating the violation.

1. *Violation of a Protected Right*

In *Griffin*, the Supreme Court stated that a § 1985(3) conspiracy "must aim at a deprivation of the equal enjoyment of rights secured by the law to all." 403 U.S. at 102, 91 S.Ct. at 1798, 29 L.Ed.2d at 348. The plaintiffs in the case at bar contend that the object of the defendants' conspiracy was to deprive them of their First Amendment right to associate with their fellow nonunion employees. They argue that curtailment of their interests secured by the First Amendment is a deprivation of equal protection of the laws within the meaning of section 1985(3) as interpreted by *Griffin*.

[5, 6] The Ku Klux Klan Act was originally entitled, "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes." 17 Stat. 13 (1871). The guaranties afforded by the First Amendment are protected by the due process clause of the Fourteenth Amendment. *E. g., Williams v. Rhodes*, 393 U.S. 23, 30-31, 98 S.Ct. 5, 10, 21 L.Ed.2d 24, 31 (1968); *New York Times v. Sullivan*, 376 U.S. 254, 276-77, 84 S.Ct. 710, 724, 11 L.Ed.2d 686, 704 (1964); *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 1217 (1940); *De Jonge v. Oregon*, 299 U.S. 353, 364, 57 S.Ct. 255, 260, 81 L.Ed. 278, 283 (1937). Moreover, the right of free association is closely aligned with the right of free speech and is similarly protected by the First Amendment. *E. g., Abood v. Detroit Board of Education*, 431 U.S. 209, 233, 97 S.Ct. 1782, 1798-99, 52 L.Ed.2d 261, 283 (1977); *Healy v. James*, 408 U.S. 169, 181, 92 S.Ct. 2338, 2346, 33 L.Ed.2d 266, 279 (1972); *Baird v. State Bar of Arizona*, 401 U.S. 1, 6, 91 S.Ct. 702, 705, 27 L.Ed.2d 639, 646 (1971); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462, 78 S.Ct. 1163, 1171-72, 2 L.Ed.2d 1488, 1499 (1958).

The defendants urge that section 1985(3) does not provide a remedy for private interference with First Amendment freedoms. They appeal to the well-established principle that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminating or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161, 1180 (1948). To support their construction of section 1985(3), the defendants rely upon several decisions of the Seventh Circuit. In *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972), the court held that section 1985(3) does not afford protection against private deprivations of rights protected under the Fourteenth Amendment absent some kind of state involvement. Emphasizing the historical connection between sections 1983 and 1985(3), the court decided that it is necessary to identify the interests which Congress intended to protect from unequal treatment as well as the kinds of conduct which it meant to proscribe.

> The breadth of the statute's coverage is yet to be determined, but three categories of protected rights have been plainly identified. *Griffin* gives express recognition to a black citizen's

> Thirteenth Amendment rights and to his federal right to travel interstate; the title of the statute expressly identifies the third category, namely, rights protected by the Fourteenth Amendment. We think the § 1983 cases make it clear that in this third category a "state involvement" requirement must survive *Griffin*.

459 F.2d at 195 (footnotes omitted).[5] Subsequently the Seventh Circuit has extended the *Dombrowski* rationale in *Murphy v. Mount Carmel High School*, 543 F.2d 1189 (7th Cir. 1976), expressly holding that section 1985(3) provides no remedy for purely private impairment of First Amendment speech and associational freedoms. *Accord Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (4th Cir. 1974).

[7] The Seventh Circuit's reasoning is contrary to the Supreme Court's analysis in *Griffin*. Of course, most basic constitutional provisions impose limitations on the power of government to regulate private conduct. Thus, the rights they confer on individuals are typically rights of the individual against the state. But the *Griffin* court, after acknowledging the conceptual difficulties associated with private deprivations of constitutional rights, construed section 1985(3) to reach both public and private constitutional wrongs.

> A century of Fourteenth Amendment adjudication has ... made it understandably difficult to conceive what might constitute a deprivation of the equal protection of the laws by private persons. Yet there is nothing inherent in the phrase that requires the action working the deprivation to come from the State. Indeed, the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in § 1985(3) of *all* deprivations of "equal protection of the laws" and "equal privileges and immunities under the laws," *whatever their source*.

403 U.S. at 97, 91 S.Ct. at 1796, 29 L.Ed.2d at 345 (citation omitted and some emphasis supplied). Thus, *Griffin* made it unmistakably clear that section 1985(3) was intended to provide a remedy for all private conspiracies. "It is thus evident that all indicators—text, companion provisions, and legislative history—point unwaveringly to § 1985(3)'s coverage of private conspiracies." *Id.* at 101, 91 S.Ct. at 1798, 29 L.Ed.2d at 347.[6] The *Griffin* Court's method of analysis and the unequivocal language of its opinion foreclose our adoption of the approach taken by the Seventh Circuit.

In addition, the interpretation given to the statute in this circuit makes that approach unnecessary. Although *Griffin* found that section 1985(3) covered purely private conspiracies, it did not announce what might constitute a deprivation of equal protection by private persons. Un-

5. *Dombrowski* recognizes that there is no statutory requirement of state participation or support for the conduct of the conspirators, *i. e.*, that there is no requirement that the defendants act under color of state law. However, where one suffers a deprivation of a federally created right which necessarily includes some component of state action, *Dombrowski* holds that such state action is also a necessary ingredient of the section 1985(3) cause of action. *See* 459 F.2d at 194-95.

6. Technically, of course, this language is dicta. *Griffin* grounded its decision on the rights secured to black citizens under the Thirteenth Amendment and the right to inter state travel, both of which operate as limits on individual conduct as well as state conduct. However, we believe that the language and reasoning of *Griffin* on this issue are sufficiently indicative of the Supreme Court's approach to be regarded as dispositive.

certainty in this regard may have contributed to the Seventh Circuit's decision to retain some form of state involvement as a part of the § 1985(3) cause of action. *See Dombrowski*, 459 F.2d at 194. However, this circuit has adopted a different tact. *McLellan* establishes that section 1985(3) was not intended to redress every conceivable private interference with another's rights. Rather, "the object of a section 1985(3) conspiracy must be to deprive another of the enjoyment of legal rights by independently unlawful conduct." *McLellan*, 545 F.2d at 927 (footnote omitted). The independent illegality requirement was derived in part from the passage in *United States v. Harris*, 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290 (1883), which explains that the only method by which a "private person can deprive another of the equal protection of the laws is by the commission of some offense against the laws which protect the rights of persons, as by theft, burglary, arson, libel, assault, or murder." *Id.* at 643, 1 S.Ct. at 612, 27 L.Ed. at 295. In this way, *McLellan* limited the potentially boundless reach of the statute and provided meaning to the concept of a private impairment of constitutional rights. Therefore, *McLellan* resolved the difficulties perceived by the *Dombrowski* court and made its analysis unnecessary.

[8] It cannot be gainsaid that the defendants' conspiracy comprehended an intent to violate the law independent of section 1985(3). The plaintiffs contend that the conspiracy was calculated to deprive them of the right to freely associate with other nonunion laborers. They have alleged and have sought to prove that the defendants conspired to accomplish this object by assaulting and beating them with wooden boards and iron bars; by destroying tools, equipment, and automobiles; and by overturning and setting fire to the Cross office trailer. The means adopted by the conspirators to deprive the plaintiffs of their rights of free association encompass patent violations of both the civil and criminal laws of Texas. *See, e. g.*, Tex.Penal Code Ann. §§ 22.01 (assault); 22.02 (aggravated assault); 28.02 (arson); 28.04 (reckless damage or destruction) (Vernon 1974). *See generally* W. Prosser, Law of Torts §§ 9–10 (assault and battery); 14 (trespass to chattels). The plaintiffs also offered proof that the conspirators engaged in the very unlawful conduct they conspired to commit and that as a result plaintiffs suffered injury to their persons and property. Under such circumstances, we conclude that section 1985(3) affords a remedy for purely private conspiracies aimed at denying their victims the First Amendment right of free association.[7]

2. *Discriminatory, Class-Based Animus*

The plaintiffs have also satisfied *Griffin's* class-based, discriminatory animus component of the § 1985(3) cause of action. Our analysis involves two distinct but closely related questions. First, does section 1985(3) coverage extend to private conspiracies founded upon some in-

7. Because of our disposition of the case, it is not necessary to decide whether section 1985(3) also protects against private conspiracies to deny rights secured under state law. *See Life Insurance Company of North America v. Reichardt*, 591 F.2d 499 (9th Cir. 1979) (holding violations of state antidiscrimination statute cognizable). It is also unnecessary to decide whether federal *statutory* rights are protected by § 1985(3). *See Novotny v. Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235 (3d Cir. 1978), *rev'd* 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979) (violations of Title VII). *Cf. McLellan*, 545 F.2d 919 (5th Cir. 1977) (right to file bankruptcy petition not protected.)

vidiously discriminatory animus other than racial prejudice? Second, if it does, is the particular class to which the plaintiffs belong, nonunion workers and their employers, one which falls within the statute's protective ambit? We answer both these questions in the affirmative.

[9] There is no allegation that the defendants in this case were motivated by an invidiously discriminatory racial animus, and there is no evidence that would support such an allegation. Indeed, the theory of the plaintiffs' case is that they are the victims of a conspiracy motivated by the defendants' hostility toward nonunion workers of any race and the employers who hire them. We must, therefore, answer the question specifically reserved by *Griffin* and still unanswered in this circuit: does section 1985(3) reach conspiracies founded upon discriminatory animus directed against classes defined by some characteristic other than race?

Griffin noted that not all private conspiracies to interfere with the rights of another would come under the protective umbrella of section 1985(3). The Court determined the congressional purpose was to include only those conspiracies animated by an "invidiously discriminatory motivation."

> The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or *perhaps otherwise class-based*, invidiously, discriminatory animus behind the conspirators' action.

403 U.S. at 102, 91 S.Ct. at 1798, 29 L.Ed.2d at 348 (some emphasis supplied). Thus, *Griffin* expressly left open the possibility that a § 1985(3) cause of action existed against private conspiracies inspired by some nonracial class bias.

Encouraged by this suggestion, numerous lower courts have already found that section 1985(3) is not limited to protecting classes defined by race. Indeed, we are aware of no post-*Griffin* decision by a circuit court that has limited the scope of the statute to racially-motivated conspiracies. See cases cited *infra* slip op. at ——— – ———, at pp. ——— – ———.

Furthermore, extending section 1985(3) protection to include conspiracies motivated by nonracial class animus comports favorably with the Supreme court's approach to other Reconstruction civil rights statutes in recent years "to 'accord [them] a sweep as broad as [their] language.'" *Griffin v. Breckenridge*, 403 U.S. at 97, 91 S.Ct. at 1796, 29 L.Ed.2d at 345. The expansive language of the statute could reach all conspiracies which deprive any class of persons of equal protection of the laws, not just those animated by racial discrimination. Sections 1981 and 1982, for example, both contain specific references to race, and the courts have consistently limited their application to instances of racial discrimination. *See, e. g., McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976) (§ 1981); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968) (§ 1982); *Olivares v. Martin*, 555 F.2d 1192 (5th Cir. 1977) (§ 1981). By contrast, however, section 1983 makes no specific reference to race, and a wide variety of nonracial classes have sought and won relief from discriminatory treatment under section 1983. *See, e. g., Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (prisoners); *Johnson v. American Credit Co.*, 581 F.2d 526 (5th Cir. 1978) (debtors attacking state pre-judgment attachment procedure); *Morris v. Michigan State Bd. of Education*, 472 F.2d 1207 (6th Cir. 1973) (sex).

Since section 1985(3), like section 1983, is not cast in racial terms, consistency demands that section 1985(3) also be read to protect nonracial classes.

The conclusion that section 1985(3) is not restricted to protecting victims of racial discrimination is also fully supported by the legislative history surrounding the statute's enactment. Both the congressional debates and the original statute's popular title suggest that the protection of groups who were being terrorized by the Ku Klux Klan (blacks and white Union sympathizers) was the Act's primary objective. Although concern for those persons victimized by Klan violence was the most pressing matter leading to adoption of the Act, both proponents and opponents of the legislation understood that it would cover other groups as well. Representative Hoar described the purpose of section 1985(3) as guaranteeing "that under no temptation of party spirit, under no political excitement, under no jealousy of race or caste, will the majority either in numbers or strength in any State seek to deprive the remainder of the population of their civil rights." Cong. Globe, 42d Cong., 1st Sess. 335 (1871). Senator Edmunds' famous remarks also aptly illustrate the congressional attitude toward what classes would enjoy section 1985(3)'s protection:

> We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one [from] getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . then this section could reach it.

Cong. Globe, 42d Cong., 1st Sess. 567 (1871). The congressional debates, which reflect a concern for all groups subjected to the Klan's organized lawlessness, make it appear that the statute's drafters intended to protect groups other than southern blacks.

Griffin, the statutory text, companion civil rights provisions, and the legislative history all indicate that a conspiracy motivated by invidiously discriminatory intent other than racial bias is actionable under section 1985(3).

However, the conclusion that section 1985(3) protects nonracial classes resolves only a part of the problem presented by this case, for we must also determine whether the particular class involved here is one which is covered by the statute's protective cloak.

[10] Precisely what kinds of nonracial classes enjoy section 1985(3)'s protection is far from clear. *Griffin* presented conduct "so close to the core of the coverage intended by Congress that it is hard to conceive of wholly private conduct that would come within the statute" if it did not. 403 U.S. at 103, 91 S.Ct. at 1799, 29 L.Ed.2d at 348. At the same time, the Court's expressed concern over the broad reach of the statute's literal language dictates the exercise of restraint in defining what nonracial class-based discrimination is covered. Thus, we expressly limit our holding to a determination that section 1985(3) encompasses a private conspiracy against nonunion laborers and their employer. Appropriate development of judicial precedent demands that further delineation of the statute's outer limits must await specific cases.

[11] Not every conceivable class of persons is covered by the statute. Members of the plaintiff class must share some common characteristic beyond simply being victims of the defendant's conspiratorial conduct. *See, e. g., Askew v. Bloemker*, 548 F.2d 673 (7th Cir. 1976) (homeowners raided by drug enforcement agents); *Harrison v. Brooks*, 519 F.2d 1358 (1st Cir. 1975) (property owners allegedly injured by city council rezoning efforts). The class cannot be so large and amorphous that its members are virtually indistinguishable from the vast majority of the populace. *See, e. g., Blevins v. Ford*, 572 F.2d 1336 (9th Cir. 1978) (nonlawyers). Even some clearly defined and easily identifiable groups have been denied protected status under the statute. *See, e. g., DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (homosexuals); *Curchman v. Korman Corp.*, 594 F.2d 354 (3d Cir. 1979), *cert. denied*, 444 U.S. 898, 100 S.Ct. 205, 62 L.Ed.2d 133 (1979) (tenant organizers); *Lessman v. McCormick*, 591 F.2d 605 (10th Cir. 1979) (debtors); *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (en banc) (persons who file voluntary bankruptcy petitions); *Bricker v. Crane*, 468 F.2d 1228 (1st Cir. 1972), *cert. denied*, 410 U.S. 930, 93 S.Ct. 1368, 35 L.Ed.2d 592 (1973) (physicians who testify in malpractice suits).

In the absence of Supreme Court guidance as to the kinds of classes protected by section 1985(3) or a method by which protected classes should be identified, our own en banc decision in *McLellan* provides our gauge. In *McLellan*, we held that the statute does not cover persons who file voluntary petitions in bankruptcy. The decision was based on three factors. First, the legislative history of the Ku Klux Klan Act contains no evidence of congressional concern about discrimination against persons who become insolvent. Second, while the protection afforded by the civil rights acts is not static, it would be inappropriate to enlarge the group of protected classes to include bankrupts when Congress had specifically declined to prohibit discrimination against them. Third, including bankrupts within the ambit of section 1985(3) would be unwarranted in light of the Supreme Court's refusal to characterize the right to file a bankruptcy petition as a fundamental right. 545 F.2d at 932–33.

[12] Applying the *McLellan* factors to our case today, we find that the plaintiffs constitute a class for § 1985(3) purposes.[8] The labor union movement in America was yet to be born when the 42d Congress was in session, so it could not have been specifically concerned with discrimination perpetrated against nonunion laborers. However, the congressional debates evince a hearty regard for persons who are victimized because of their political beliefs and associations. Today's Ku Klux Klan proclaims itself to be a racist organization. But in 1871 it was regarded primarily as a political one. The motives and ambitions of the Klan disturbed the Republicans in the 42d Congress because they feared that its activities would defeat the policies of Reconstruction and deprive the newly emancipated blacks of rights secured to them under the recent amendments to the Constitution. Senator John Sherman of Ohio voiced this concern after he read aloud from a copy of the Klan's secret oath,

8. Our reliance upon the factors deemed relevant in *McLellan* does not necessarily imply that they are the only relevant considerations. Conceivably, other factors may be regarded as sufficient to include or to exclude other classes from § 1985(3) coverage.

> showing that here is a political organization, with political ends, political aims; it shows that the object and intent of that political organization is to prevent large masses of the people of the southern States from enjoying a right which has been guaranteed to them by the Constitution of our country.

Cong. Globe, 42d Cong., 1st Sess. 153 (1971). The Klan's political objective formed a recurrent theme in the Senate debates.[9]

The apprehension of Republican senators over the Klan's scheme of terrorizing citizens for their political views and of preventing voters from exercising their franchise also echoed throughout the debates conducted in the House. Representative Ellis Roberts of New York expressed this concern in the following terms:

> But one rule never fails: the victims whose property is destroyed, whose persons are mutilated, whose lives are sacrificed, are always Republicans. They may be black or white; they include those who wore the blue and those who wore the gray; newcomers and life-long residents, but only Republicans. Stain the door lintels with the mark of opposition to reconstruction and of hostility to the national Administration and the destroying angel passes by. Omit that sign and the torch may kindle the roof that covers women and children.... Such uniformity of result can come only from design. Republicans only are beaten and mutilated and murdered, because the blows are aimed at Republicans only.

Cong. Globe, 42d Cong., 1st Sess. 412–13 (1871). Other Republican congressman expressed similar views.[10] *See generally* Comment, *A Construction of Section 1985(c) in Light of its Original Purpose*, 46 Univ.Chi.L.Rev. 402, 407–420 (1979).

Thus, whereas *McLellan* could locate no indication of congressional purpose to protect persons discriminated against for filing bankruptcy petitions, the legislative history reflects a pervasive concern for persons conspired against for their political associations. The congressional debates surrounding adoption of the Act therefore provide support for including within the ambit of section 1985(3) those such as the plaintiffs who are punished because of their associations.

Similarly, enlarging the scope of the statute to include nonunion workers who are attacked for their choice to associate with other nonunion workers, thereby enabling an employer to offer significant work to the class, is appropriate in light of subsequently enacted federal legislation. While Congress has specifically refused to prohibit discrimination against bankrupts in legislation it has enacted on the subject, it has manifested a desire to

9. *See, e. g.*, Cong. Globe, 42d Cong., 1st Sess. 252 (remarks of Sen. Morton) ("[t]he purpose [of the Klan] is by these innumerable and nameless crimes to drive those who are supporting the Republican party to abandon their political faith or to flee the State."); *id.* at 504 (remarks of Sen. Pratt) (the primary purpose of the Klan "is to punish men for their political opinions"); *id.* at 702 (remarks of Sen. Edmunds) (the "systematic plan [of the Klan] is not to leave in any of those States a brave white man who dares to be a Republican or a colored man who dares to be a voter").

10. *See, e. g.*, Cong. Globe, 42d Cong., 1st Sess. 72 (remarks of Rep. Blair) (the Klansmen "murder for a difference in political opinions") *id.* at 333 (remarks of Rep. Hoar) (the Klan is a "secret political conspiracy"); *id.* at 391 (remarks of Rep. Elliott) ("the design of the Ku Klux is political"); *id.* at 488 (remarks of Rep. Lansing) ("the Ku Klux in their crimes are inspired by political zeal").

protect laborers who opt not to affiliate themselves with a labor organization. Section 7 of the original Wagner Act provided that

> [e]mployees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Wagner Act, § 7, 49 Stat. 452 (1935). When Congress passed the original Act, it rejected the argument that parity required granting protection against coercive tactics of labor organizations as well as against those committed by employers. *See* S.Rep. 573, 74th Cong., 1st Sess. 16 (1935).

However, significant change was not long in coming. The 1947 Taft-Hartley amendments to the National Labor Relations Act brought the addition of unfair labor practices by labor organizations. The Taft-Hartley Act retained the right to form, join, or assist labor organizations, but it revised section 7 of the original Act so it would contain "the right to refrain from any or all such activities." Taft-Hartley Act, § 101, 61 Stat. 140 (1947), currently codified at 29 U.S.C. § 157. Section 8(b)(1) now declares it to be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed by section 7. 29 U.S.C. § 158(b)(1). Congress has thereby underscored the importance of the right of free association in the labor relations context and has guaranteed the right to a free and untrammeled choice to associate or not to associate with a labor organization. This manifestation of congressional concern for those in plaintiffs' class makes their protection by section 1985(3) particularly appropriate.

Finally, *McLellan* regarded the Supreme Court's refusal to call the right to file a bankruptcy petition a fundamental right as relevant to its own determination that bankrupts are not protected by section 1985(3). By contrast, the Supreme Court has characterized the right of free association as "a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486, 81 S.Ct. 247, 251, 5 L.Ed.2d 231, 236 (1960). Our legal system honors the freedom of the individual to associate as he chooses because that freedom "tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change." *Gilmore v. City of Mobile*, 417 U.S. 556, 577, 94 S.Ct. 2416, 2427, 41 L.Ed.2d 304, 321 (1974). The importance of the freedom of association has led the court to call it one of the "indispensable liberties," *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488, 1499 (1958), which ranks "among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24, 31 (1968). The right of association is fundamental in our constitutional scheme of values. Thus, the difference in importance assigned to the right to file a bankruptcy petition and the right of the individual to freely associate with others of his own choosing favors protecting these plaintiffs.

Our determination that the plaintiffs constitute a protected class under section 1985(3) also comports favorably with the construction of the statute given by other courts. The lower federal courts have accorded § 1985(3) protection to two broad categories of nonracial classes. The first category consists of classes whose members are identified with one

another by some inherited or immutable physical trait or by a history of past discrimination. See, e. g., *Life Insurance Company of North America*, 591 F.2d 199 (9th Cir. 1979) (women); *Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973) (Jews); *Baer v. Baer*, 450 F.Supp. 481 (N.D.Cal.1978) (members of the Unification Church); *Mandelkorn v. Patrick*, 359 F.Supp. 692 (D.D.C.1973) (Children of God). Women, ethnic minorities, and religious sects are usually included under the statute because they are classes whose members bear no responsibility for their distinctive characteristics or because membership in the class has traditionally inflamed the irrational fears and hatreds of the majority.[11] Thus, they may be regarded as one of the groups which "require and warrant special federal assistance in protecting their civil rights." *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d at 332–33. The plaintiffs cannot claim they are distinguished from other persons by some immutable or inherited physical trait, like race or gender, over which they have no control.

However, courts have also granted protection to classes whose members are discriminated against because of their political beliefs or their associations. *See, e. g., Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S. 958, 96 S.Ct. 1436, 47 L.Ed.2d 364 (1976) (supporters of a particular political candidate); *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975) (political demonstrators); *Smith v. Cherry*, 489 F.2d 1098 (7th Cir. 1973), *cert. denied*, 417 U.S. 910, 94 S.Ct. 2607, 41 L.Ed.2d 214 (1974) (voters for a sham political candidate); *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973) (supporters of incumbent sheriff); *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) (worshipers at a predominantly white Catholic church disrupted by black civil rights protesters). It is within this second category of classes that plaintiffs fall.

Plaintiffs were denied the equal protection of law because they did not belong to a labor organization or worked for an employer which did not have a collective bargaining agreement and which hired workers without regard to their union membership. One of the unidentified co-conspirators made it clear to the plaintiffs before the destruction began that Port Arthur was a "union town." The plaintiffs were attacked and beaten and property was destroyed because they chose to exercise their right not to join a labor organization and to work with others of the same mind. In view of the foregoing considerations, we hold that the plaintiffs belong to a class protected by section 1985(3).

[13] Our decision does not imply that every union-nonunion controversy can create a section 1985(3) cause of action. Neither does it imply that every instance of violence arising in the context of a labor dispute will necessarily do so. Powerful limitations exist to restrict an overly broad application of the statute. *See generally McLellan*, 545 F.2d at 940–41 (Godbold, J., dissenting). Section 1985(3) cannot be invoked to disrupt the opera-

11. With respect to women, the Third Circuit has said that "[t]he fact that a person bears no responsibility for gender, combined with the pervasive discrimination practiced against women, and the emerging rejection of sexual stereotyping as incompatible with our ideals of equality" is sufficient to warrant treating gender as a characteristic comparable to race. *Novotny v. Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235, 1243 (3d Cir. 1978), *rev'd on other grounds*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979). Similar treatment of religious minorities can be justified because they often provoke the "fear, hatred and irrationality of the majority." *Baer v. Baer*, 450 F.Supp. 481, 491 (N.D.Cal.1978).

tion of a carefully integrated statutory scheme. *See Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979) (holding that deprivation of a right created by Title VII cannot form the basis for § 1985(3) cause of action). Neither can a § 1985(3) cause of action be predicated upon a simple unfair labor practice. *Cf. United States v. DeLaurentis*, 491 F.2d 208 (2d Cir. 1974) (holding an unfair labor practice not cognizable under 18 U.S.C. § 241, the criminal analogue to section 1985(3)). Unionism or nonunionism in and of itself does not create a covered class. But where, as here, there is no campaign to organize employees and force or violence is used to deprive nonunion workers and their employer of the right to freely associate with one another, a section 1985(3) action will lie.[12]

IV. THE CONSTITUTIONAL QUESTION: THE SOURCE OF CONGRESSIONAL POWER

[14] Having determined that section 1985(3) was intended to provide a civil remedy for the kind of conspiracy involved here, we must respond to defendants' argument that Congress lacks the constitutional power to enact legislation of this breadth. The plaintiffs maintain that section 5 of the Fourteenth Amendment authorizes Congress to provide a civil remedy for this private conspiracy. On the particular facts before us, we hold that the Commerce Clause empowers Congress to reach defendants' conduct and do not reach the Fourteenth Amendment issue.

Griffin emphasized that it was unnecessary to test the constitutionality of section 1985(3) in all conceivable applications in order to sustain its facial constitutionality and its application to the facts of any particular case. 403 U.S. at 105, 91 S.Ct. at 1799, 29 L.Ed.2d at 350. *Griffin* also makes clear that section 1985(3) is not unconstitutional merely because it reaches wholly private conspiracies. By the same token, it indicates that a source of congressional power must be identified to warrant application of the statute in each case.

12. It should be observed that the National Labor Relations Board has a long-established policy against awarding monetary damages for physical injury and property damage caused by strike or picket line violence for which the union is held responsible. *See Union de Tronquistas Local 901 (Lock Joint Pipe & Co.)*, 202 N.L.R.B. 399 (1973); R. Gorman, Basic Text on Labor Law 217 (1976); D. McDowell & K. Huhn, NLRB Remedies for Unfair Labor Practices 99-100 (1976). The Board's refusal to give damage awards is predicated in part upon its view that such awards would unduly interfere with the policy of the National Labor Relations Act to protect concerted activities and that other remedies against union violence are sufficient deterrent. *Union de Tronquistas*, 202 N.L.R.B. at 400. Its practice is also grounded in concern for the proper institutional role to be played by the Board. *See District 1199, National Union of Hospital and Health Care Employees (Frances Scherver Home and Hospital)*, 345 N.L.R.B. 105 (1979) (Board is not equipped to handle personal injury claims); *Union Nacional de Trabajadores*, 219 N.L.R.B. 157 (1975) (awards are punitive and, therefore, not part of the Board's statutory function).

Whatever the basis for the Board's refusal to order compensation for injuries suffered during strike or picket line violence, our decision that section 1985(3) affords a remedy in this case does not offend that policy. In this case, no lawful concerted activity was taking place when the Cross construction site was attacked. There was no organizational campaign, no union demand for recognition, no informational picket, and no collective bargaining in progress. In such circumstances, a civil remedy for damages presents no danger of thwarting the Board's policy. However, whether section 1985(3) should also extend to other conspiracies against nonunion workers and their employers is a question which we expressly pretermit.

The *Griffin* court concluded that the Thirteenth Amendment and the constitutional right to interstate travel authorized Congress to reach the private conspiracy alleged there. But the court concluded its opinion, stating

> In identifying these two constitutional sources of congressional power, we do not imply the absence of any other. More specifically, the allegations of the complaint in this case have not required consideration of the scope of the power of Congress under § 5 of the Fourteenth Amendment.

Id. at 107, 91 S.Ct. at 1801, 29 L.Ed.2d at 351.

The plaintiffs' § 1985(3) action cannot be sustained under the Thirteenth Amendment, for they are neither a racially oppressed group nor suffering in the bonds of involuntary servitude. *See, e. g., Jones v. Mayer*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968); *Clyatt v. United States*, 197 U.S. 207, 25 S.Ct. 429, 49 L.Ed. 726 (1905). Neither can it be supported by the right to travel on the present record. Although the plaintiffs alleged that the object of the defendants' conspiracy was to deprive them of the right to interstate travel, they have introduced no evidence to show that either the purpose or the result of the conspirators' acts was to infringe upon their right to such travel.

However, the alternative path suggested by *Griffin* is itself fraught with uncertainty. A major controversy still exists over the extent to which section 5 of the Fourteenth Amendment grants Congress the power to reach wholly private conduct. Particularly, whether section 1985(3) can be constitutionally applied to private, nonracially motivated conspiracies is a question which has divided the circuits. *Compare Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) *and Richardson v. Miller*, 446 F.2d 1247 (3d Cir. 1971) (holding that the Fourteenth Amendment authorizes Congress to reach purely private conduct) *with Murphy v. Mount Carmel High School*, 543 F.2d 1189 (7th Cir. 1976) (finding that it does not). Furthermore, no single interpretation of the expanse of Congress's power under section 5 has consistently commanded the adherence of a majority of the Supreme Court. *Compare United States v. Guest*, 383 U.S. 745, 762, 86 S.Ct. 1170, 1180, 16 L.Ed.2d 239, 251 (1966) (Clark, J., concurring, joined by Black and Fortas, JJ.) *and id.* at 782, 86 S.Ct. at 1190, 16 L.Ed.2d at 263 (Brennan, J., concurring and dissenting, joined by Warren, C.J. and Douglas, J.) (suggesting that § 5 empowers Congress to punish purely private conspiracies to deprive Fourteenth Amendment rights), *with, id.* at 753–60, 86 S.Ct. at 1175–80, 16 L.Ed.2d at 246–250 (opinion of the Court by Stewart, J., relying on right to interstate travel) *and id.* at 762, 86 S.Ct. at 1180, 16 L.Ed.2d at 251, (Harlan, J., concurring and dissenting). *See Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970); *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966).

We need not depend on this uncertain precedent for congressional power. *Griffin* clearly contemplated that other sources of congressional power might be available to justify other applications of section 1985(3). Indeed, the original proponents of the Ku Klux Klan Act did not base their assertion of congressional power exclusively on the Fourteenth Amendment. *See, e. g.*, Cong.Globe, 42d Cong., 1st Sess. 81 (1871) (remarks of Rep. Bingham) ("It was always competent for the Congress of the United States by law to enforce every affirmative grant of power . . . ."); *id.* at 477–78 remarks of Rep.

Shellabarger (referring to the amendment to § 2 "so far as it is not confined to infractions of rights which are clearly independent of the Fourteenth Amendment, referable to and sustained by the old provisions of the Constitution"). On the facts presented in this case, Congress has the authority to reach a wholly private conspiracy under the commerce power conferred by article I, section 8 of the Constitution.

A.A. Cross Construction Company is a general contractor in the building and construction industry. The record indicates that during the year preceding the violent episode of January 17, 1975, Cross had performed work outside of Texas valued in excess of $300,000. During that same period, Cross purchased goods and materials which originated outside of Texas, were used in its operations within Texas, and were valued at more than $50,000. In addition, at the time of the attack on the Alligator Bayou construction site, Cross was performing its obligations under a contract with the United States Army Corps of Engineers.

[15] Article I, section 8, clause 3 of the Constitution confers upon Congress the power "[t]o regulate Commerce . . . among the several states" and clause 18 of the same article grants it the power "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers. . . ." As the Supreme Court has pointed out, this grant of power "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119, 62 S.Ct. 523, 526, 86 L.Ed. 726, 732 (1942). "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 464, 69 S.Ct. 714, 716, 93 L.Ed. 805, 811 (1949). *See United States v. Darby*, 312 U.S. 100, 118, 61 S.Ct. 451, 459, 85 L.Ed. 609, 619 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 57 S.Ct. 615, 624, 81 L.Ed. 893, 911 (1937). . Moreover, that the volume of goods and supplies purchased by Cross or that the volume of business done outside of Texas is comparatively small in terms of the total amount of goods moved or work performed in interstate commerce is not significant. *Katzenbach v. McClung*, 379 U.S. 294, 300–01, 85 S.Ct. 377, 382, 13 L.Ed.2d 290, 291 (1964); *Wickard v. Filburn*, 317 U.S. 111, 127–28, 63 S.Ct. 82, 90, 87 L.Ed. 122, 136 (1942). Judicial inquiry is limited to asking whether Congress had "a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce. . . ." *Katzenbach v. McClung*, 379 U.S. at 304, 85 S.Ct. at 377, 13 L.Ed.2d at 298. And it is not constitutionally relevant that Congress was actually "legislating against moral wrongs" when it enacted the provisions in question. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257, 85 S.Ct. 348, 357, 13 L.Ed.2d 258, 268 (1946). Chief Justice Marshall's classic formulation of the extent of congressional power is still viable.

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

McCulloch v. Maryland, 4 Wheat. 316, 421, 4 L.Ed. 579, 605 (1819).

By these standards, Congress acted within its constitutional power when it enacted section 1985(3) to reach the private conspiracy involved here. It cannot be denied that the aim of protecting interstate commerce from undue burdens is a legitimate end. Congress could reasonably have determined that violent attacks and vandalism perpetrated on the workers of a construction firm engaged in interstate commerce would have a disruptive effect on the flow of products and services among the states. It is also beyond dispute that the aim of protecting interstate workers in the exercise of their First Amendment associational freedoms is a legitimate end. The means adopted for the accomplishment of these ends, a private civil remedy for damages, is plainly reasonable and appropriate. Section 1985(3) as applied to the facts before us is not prohibited by the Constitution and is compatible with both its letter and its spirit. Whether section 1985(3) can constitutionally be applied to other kinds of wholly private conspiracies to deprive persons of their civil rights is a question for another day.

V. THE EVIDENTIARY QUESTION: STANDARD OF PROOF AND SUFFICIENCY OF EVIDENCE

A. *The Standard of Proof*

[16, 17] The unions contend that they cannot be held liable for unlawful acts committed at the Cross construction site by some individual members of their organizations without "clear proof" that they actually participated in the unlawful conduct, gave prior authorization of it, or ratified the acts after actual knowledge of their commission. This more rigorous standard of proof derives from section 6 of the Norris-LaGuardia Act which provides:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

29 U.S.C. § 106. This statutory standard of proof thus lies somewhere between the traditional burdens of reasonable doubt and preponderance of the evidence. With it, Congress intended to require "clear, unequivocal, and convincing proof" of union involvement in unlawful conduct to impose liability for it. *United Mine Workers v. Gibbs*, 383 U.S. 715, 737, 86 S.Ct. 1130, 1145, 16 L.Ed.2d 218, 234 (1966). Yet, while section 106 requires clear and convincing evidence as to union authorization, participation in, or ratification of the acts allegedly performed by its members, it does not prescribe a different standard of proof for other issues in actions against a union or its officers or members involved in a labor dispute. *Ramsey v. United Mine Workers*, 401 U.S. 302, 91 S.Ct. 658, 28 L.Ed.2d 64 (1971).

The unions also recognize that section 106 is by its own terms limited to cases in which the union is participating or interested in a labor dispute. The Norris-LaGuardia Act defines a "labor dispute" to encompass

> any controversy concerning terms and conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the

disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 113(c). The unions insist that the literal language of section 113(c) squarely covers the conduct at issue here. The persons who planned and executed the attack on the Alligator Bayou construction site were motivated by their resentment of Cross's employment practices and hostility toward its nonunion workers. Because the conspiracy that generated the case was formed around this nonunion animus, the defendants maintain that the controversy out of which this case arose cannot be anything other than a labor dispute.

[18, 19] This approach has a certain superficial appeal. Doubtless the attack on the Cross construction site was conceived in reprisal for the refusal of Cross and his workers to accede to demands that the Alligator Pumping Station project be conducted as a union job. Nevertheless, in construing any congressional enactment it is necessary to interpret the meaning of the words as they are used in relation to the setting in which they were written, with due regard to the mischief which the legislation was designed to remedy. In that light, these unions were not participating in a "labor dispute" as that language is employed in section 113(c) because their activity does not fall within the abuses that Congress intended to prevent.

The Norris-LaGuardia Act was passed in a particular social economic, and legal milieu. During the early part of this century, federal injunctive powers were often invoked to check the spread of union organization and collective bargaining. But Congress conceived that the courts were being made to play a partisan role in labor-management conflicts, in part because judicial injunctive relief usually did nothing to resolve the underlying industrial dispute. The Norris-LaGuardia Act was intended to curb this unwarranted judicial interference in the struggle between employers and employees. Instead, Congress decided to allow such controversies to be settled through negotiation and through the free play of economic forces.

> The Norris-LaGuardia Act . . . was designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining. . . . Congress acted to prevent the injunctions of the federal courts from upsetting the natural interplay of the competing economic forces of labor and capital.

Brotherhood of Railroad Trainmen v. Chicago River and Indiana Rd., 353 U.S. 30, 39, 77 S.Ct. 635, 640, 1 L.Ed.2d 622, 628 (1957). Thus, the policy section of the Act stresses the worker's "freedom of association, self-organization, and designation of representatives of his own choosing" as indispensable to the private settlement of these disputes. 29 U.S.C. § 102. Congress thereby made the use of legitimate economic weapons—the picket, the strike, the boycott—part of the warp and woof of our national labor relations policy. *See generally Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 250–51, 90 S.Ct. 1583, 1592, 26 L.Ed.2d 199, 210 (1970); *Milkwagon Drivers' Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91, 100–03, 61 S.Ct. 122, 127–28, 85 L.Ed. 63, 68–70 (1940); A. Cox, D. Bok, & R. Gorman, Labor Law 60–64 (8th ed. 1977).

One of the special abuses identified by Congress was the use of vicarious liability doctrines under which the misconduct of a few individuals could be attributed to the labor organization that sponsored a strike or picket line. Courts had applied

the common law of conspiracy to hold unions responsible not only for the conduct of their authorized agents, but also "for every act committed by any member of a union merely because he was a member, or because he had some relation in the union although not authorized by virtue of his position to act for the union in what he did." *United Brotherhood of Carpenters and Joiners v. United States*, 330 U.S. 395, 419, 67 S.Ct. 775, 788, 91 L.Ed. 973, 991 (1947) (Frankfurter, J., dissenting).

This conspiracy approach to union responsibility could frustrate the labor relations policy chosen by Congress. Imposing liability on the union for the unauthorized lawlessness of its more improvident members would penalize the union lawfully engaged in using the legitimate economic weapons thought necessary for the proper resolution of labor-management conflicts. Therefore, Congress enacted section 106, requiring clear proof of union participation in, authorization, or ratification of unlawful conduct before liability could attach.

However, there is no danger of frustrating the congressional policy favoring collective bargaining and no risk of punishing union engagement in protected activity in the case before us. When the events giving rise to this case occurred, no union had a collective bargaining agreement with Cross, and none was seeking recognition as the collective bargaining representative for Cross's workers. No solicitation or other organizational efforts were in progress to attain representation of the Cross employees. No labor organization was staging an informational picket to publicize Cross's employment practices. In short, there were no legitimate union activities taking place when the Alligator Bayou construction project was attacked. Here, some irresponsible individuals sympathetic to the cause of organized labor in Port Arthur, Texas, simply decided to make the Cross construction project an example for other unorganized companies and nonunion workers in the community. This is not the kind of controversy contemplated by Congress when it required "clear proof" of misconduct by a union "participating or interested in a labor dispute."

[20] On the other hand, a labor dispute does exist where unlawful conduct occurs in conjunction with some legitimate union activity. *See, e. g., Cedar Crest Hats, Inc. v. United Hatters, Cap & Millinery Workers Int'l Union*, 362 F.2d 322, 327–28 (5th Cir. 1966). A labor dispute may also exist even though the otherwise legitimate union conduct is unlawful under some other statutory scheme. *See, e. g., Marine Cooks & Stewards v. Panama Steamship Co.*, 362 U.S. 365, 370–71, 80 S.Ct. 779, 783–84, 4 L.Ed.2d 797, 801–802 (1960); *Order of R. R. Telegraphers v. Chicago & N. W. Ry.*, 362 U.S. 330, 339 n.15, 80 S.Ct. 761, 766 n.15, 4 L.Ed.2d 774, 781 n.15 (1960); *Milkwagon Drivers' Union v. Lake Valley Farm Products, Inc.*, 311 U.S. at 103, 61 S.Ct. at 128, 85 L.Ed. at 70. But neither situation is present here. Our holding, therefore, is necessarily a very narrow one: where a labor organization is accused of engaging in unlawful activity not associated with any on-going legitimate union conduct, the union is not participating in a labor dispute within the meaning of 29 U.S.C. § 113(c). Therefore, since the violence at the Alligator Bayou construction site did not occur in conjunction with a labor dispute, the clear-proof standard of section 106 is not applicable.

B. *Sufficiency of the Evidence*

[21] The unions finally urge that the evidence adduced at trial is insufficient

to support the judgment against them under any standard of proof. After carefully reviewing the entire record, we agree that the evidence does not warrant the district court's finding of involvement in the conspiracy for many of the unions vouched in judgment. However, as to the remaining unions, we cannot say that the factual conclusions reached by the district court are clearly erroneous.

[22] The factual findings made and the inferences drawn by the district court "come here well armed with the buckler and shield" of the clearly erroneous rule embodied in Federal Rule of Civil Procedure 52(a). *Horton v. U. S. Steel Corp.*, 286 F.2d 710, 713 (5th Cir. 1961). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, 765 (1948). The appellate court must be especially reluctant to disregard a factual finding based upon the evaluation of testimony that draws credibility into question, *Graver Tank and Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 537-38, 93 L.Ed. 672, 676 (1949); it may not consider the evidence anew, *Zenith Radio Corp. v. Hazeltime Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129, 151 (1969); and merely because it might have reached a different result on the same evidence will not justify its setting the district court's findings aside. *United States v. National Ass'n of Real Estate Bds*, 339 U.S. 485, 495-96, 70 S.Ct. 711, 717, 94 L.Ed. 1007, 1016 (1950).

The court below concluded that the assault on the Alligator Bayou construction site "evolved from a meeting held by the Executive Committee of the Sabine Area Building and Construction Trades Council on January 15, 19[illegible], wherein a 'citizen protest' was discussed and a time and place were chosen for such a protest." 461 F.Supp. at 226. However, the evidence in the record does not support this inference. There was nothing unique about the January 15 congregation; it was the Council's regularly scheduled weekly meeting. The minutes of the meeting contain only one cryptic entry which might conceivably be construed to refer to the Cross construction site protest, and it is wholly innocuous.[13] In addition, those union representatives who actually attended the meeting testified that the committee discussed the Cross project and that some members mentioned they had heard of a demonstration to be held on the jobsite the following Friday. The import of their testimony is that the protest had already been conceived several weeks before January 15 and that neither the time nor the place for it were set by the Council. Furthermore, there is no evidence that the Council endorsed the planned protest: no motions were offered and no formal resolutions were adopted. The only connection between the Wednesday meeting and the Friday violence is the nearness in time between the two events. Given the regular sequence of such weekly meetings, this link is too tenuous. As to those unions against which the only evidentiary link is their participation in the January 15 meeting of the Sabine Area Building and Construction Trades Council, the judgment of the district court must be reversed.

13. The minutes show that the "good and welfare" of the community were discussed.

An additional fact casts the district court's error into even sharper relief. The court exonerated two unions as to which the only evidence of involvement was their representation at the January 15 meeting, yet it held other unions liable even though the proof against them was no stronger. Furthermore, the district court held the Operating Engineers, Local 450, liable, and that organization neither belonged to the Building and Construction Trades Council nor attended its January 15 meeting nor was otherwise shown to be connected with the violence. The additional evidence relevant to the Operating Engineers is no more compelling. The judgment against the union of Operating Engineers, Local 450, must too be reversed.

However, the situation is different with respect to the United Brotherhood of Carpenters and Joiners of America, Local 610. In mid-summer of 1974, before construction began on the Alligator Bayou project, Cross received a visit in his Houston office from an official of the union. John Wallace, financial secretary and business representative for the Carpenters Local 610, gave Cross his business card and informed him that he wanted the union to furnish laborers for the job. He also asked Cross to sign a union contract. Cross agreed to hire members of Wallace's union but refused to enter into the proposed agreement. Wallace then told Cross that his refusal would "cost him a million dollars."

Wallace had no further contact with the Alligator Bayou project until January 17, 1975, when the attack occurred. On that day, Wallace was present at the highway near the access road which led to the Cross jobsite on at least two separate occasions. More damaging, however, is the fact that Wallace was also observed with Robert Faulk, subsequently identified as one of the principal participants in the violence committed that morning. The two men, riding in Wallace's pickup truck, drove part of the way down the road leading to the construction site, confirmed that the Cross workers had arrived at the scene, and returned to the highway. Shortly thereafter, the mob attacked Cross's workers. Wallace admitted that he was at the highway and that he and Faulk approached the construction site together. Not surprisingly, however, his version is less sinister. He also testified that he saw some members of Local 610 and that, before leaving the area, he expressly instructed them not to engage in any violence. From this evidence, the district court concluded that the union had actually participated in the conspiracy, and we cannot say that his factual inferences and credibility resolution are clearly erroneous. Therefore, the judgment against the United Brotherhood of Carpenters and Joiners, Local 610, is affirmed.

Similarly, we affirm the judgment against the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 195. Bruce Hill, one of two business representatives for the Local, appeared at the Cross construction site shortly after the violence had ended. Fulton Johnson, the Corps of Engineers inspector assigned to the Alligator Bayou project, described Hill's conduct at the scene. He testified that Hill was laughing and joking and that his light-hearted demeanor and remarks were highly inappropriate for the gravity of the situation. While Johnson and a colleague were attempting to take photographs of the damage, Hill repeatedly interposed himself in front of the camera, urging him to take his photograph with a burning trailer behind him. Johnson re-

called that Hill sarcastically told them he wanted the photograph to post on the bulletin board at the local so that "he could show his men what not to do."

Hill himself gave a more innocent account of the episode, and denied saying that he wanted the picture for the union bulletin board. His explanation for seeking the photograph was, "I don't know. I guess I am a camera freak. I like to have my picture taken." Although the local's other business representative had attended the January 15 meeting of the Trades Council when the protest was discussed, Hill said he first learned of the events around 8:00 that Friday morning when he overheard some men talking at a grocery store. He stated that he went to the Cross construction site to check on a friend who worked nearby, even though he had never been there to see him before. Although the evidence is sparse, we cannot say that the district court's finding that the Pipefitters Local 195 was involved in the conspiracy is clearly erroneous.

Lastly, we also affirm the district court's finding as to the United Brotherhood of Carpenters and Joiners of America, Local 753. Jay Desormeaux and Curtis Beasley, members but not officers of Local 753, were both observed on the Cross construction site during the violent melee of January 17. Desormeaux recounted a conversation he had with Randy Wylie, assistant business agent for the local, on the preceding Wednesday or Thursday when they discussed the planned protest. Wylie admitted that Desormeaux had called him to ask about the demonstration but denied instructing him to go to the work site. Wylie also admitted seeing Desormeaux at the highway on the fateful Friday morning.

There was still more evidence suggesting that the union had authorized the unlawful conduct. Both Desormeaux and Beasley were named as defendants in this lawsuit. Beasley testified that, after the suit was commenced, Wylie had referred him to the union's own lawyers for representation in matters connected with his part in the violent events of January 17. Desormeaux also stated that he had spoken with both Wylie and W. H. Carr, business agent for Local 753, about obtaining a lawyer and expressed his belief that the union would pay his attorney fees. Carr informed Desormeaux that the union furnishing him with a lawyer would be "the least they could do," since he was a union member. However, Desormeaux knew of no formal arrangement by which the union regularly provided legal services to its members and conceded that the union had never done so for him. Wylie denied talking with Desormeaux about attorney fees, but, apart from that denial, the union made no effort to rebut this testimony. It did not deny furnishing legal services for its members in actions arising from the violence. The evidence in the record permitted the inference that the union sponsored the attack on the Cross employees and then undertook to lend assistance to its members who were discovered in the unlawful enterprise. The appellate issue is not whether we might have taken a different view had the evidence been presented initially to us. It is whether the district court's determination that the Carpenters Local 753 authorized or participated in the attack is clearly erroneous. It is not.

VI. CONCLUSION

In summary, we hold that (1) the anti-injunction provisions of the Norris-LaGuardia Act do not deprive the district

court of jurisdiction to enjoin violence, and (2) Congress intended 42 U.S.C. § 1985(3) to provide a remedy for private conspiracies directed at nonracial classes. Specifically, we determine that the statute encompasses a conspiracy designed to deprive nonunion workers and their employer of the First Amendment right to freely associate with one another where that conspiracy does not occur in conjunction with legitimate union activity and is perfected by force and violence. In addition, we hold that the Commerce Clause empowers Congress to reach the private conspiracy involved in the case before us. Furthermore, since this case does not involve a labor union participating or interested in a labor dispute within the meaning of 29 U.S.C. § 113(c), the clear-proof standard of 29 U.S.C. § 106 is inapplicable. We conclude that the district court's findings that the Carpenters Local 610, Pipefitters Local 195, and Carpenters Local 753 authorized or participated in this conspiracy were not clearly erroneous. Nevertheless, we find that the evidence of participation in the conspiracy is insufficient to warrant the district court's judgment against the remaining eight unions.

In light of the foregoing, the judgment of the district court is

AFFIRMED IN PART AND REVERSED IN PART.

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APPENDIX C

UNITED STATES DISTRICT COURT
E. D. TEXAS
BEAUMONT DIVISION

Civ. A. No. B-75-26-CA

PAUL E. SCOTT ET AL.,
Plaintiffs,

v.

BILL MOORE ET AL.,
Defendants.

Nov. 16, 1978

MEMORANDUM OPINION

JOE J. FISHER, Chief Judge.

This is a case in which the Plaintiffs, Paul E. Scott, James T. Matthews, and others, while in the employment of another Plaintiff in this suit, A.A. Cross Construction Co., Inc., were attacked and beaten while constructing a pump station known as the Alligator Bayou Pump Station on the hurricane levee along Taylor's Bayou, near Port Arthur, in Jefferson County, Texas.

The evidence reflects that the attack evolved from a meeting held by the Executive Committee of the Sabine Area Building and Construction Trades Council on January 15, 1975, wherein a "citizen protest" was discussed and a time and place were chosen for such protest. The purpose of this demonstration was to voice concern over Cross Construction Company, Inc.'s bringing "outside" nonunion workers into a "union area." In addition, the evidence shows that the Plaintiffs were informed by several Defendants that if the Plaintiff, Cross Construction Co., Inc., continued to hire nonunion personnel for

the work to be performed on the Alligator Bayou Station, there would be "serious trouble."

Unions represented and individuals present at the January 15, 1975 meeting included:

Walter Flowers, Laborers Local #870
H. H. Silkwood, Cement Masons Local #884
Pete Ellis, Pipefitters Local #195
Randy Wylie, Carpenters Local #753
John D. Wallace, Jr., Carpenters Local #610
W. H. Carr, Carpenters Local #753
J. L. St. Clair, Painters Local #243
Jesse Martin, Boilermakers Local #277
J. C. Vaughn, Boilermakers Local #587
L. P. Vaught, Ironworkers Local #125
A. B. Wheeler, Carpenters District Council of Sabine Area

Pete Bean, Sheet Metal Workers Local #198
Walter Keneson, I.B.E.W. Local #479

Thereafter, on January 17, 1975, a large group of individuals, including union members present at the January 15, 1975 meeting, amassed at the entrance to the Alligator Bayou Construction site. From this group, several truckloads of men emerged, drove onto the construction site, assaulted and beat the Plaintiffs, burned and destroyed the tools and equipment of Plaintiff, Cross Construction Co., Inc., and threatened to continue violent actions if the nonunion workers did not leave the area or concede to union policies and principles.

A suit was then filed pursuant to 42 U.S.C. 1985(3) with jurisdiction predicated upon 28 U.S.C. 1343 and 1331. Section 1985(3) states, in relevant part:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privi-

> leges and immunities under the laws; . . . (and) in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

To come within the purview of 42 U.S.C. 1985(3), a complaint is required to allege four matters:

(1) the defendants must conspire

(2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and

(3) the defendants must act in furtherance of the object of the conspiracy, whereby

(4) one was (a) injured in his person or property or (b) deprived of having and exercising any right or privilege of a citizen of the United States.

Griffin v. Breckenridge, 403 U.S. 88, 102-103, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

In addition, the *Griffin* Court interpreted the language requiring intent to deprive of equal protection or equal privileges and immunities, to mean that such intent must have at its foundation some racial or perhaps otherwise class-based invidiously discriminatory animus. However, the Supreme Court refrained from deciding whether a conspiracy motivated by such invidiously discriminatory intent, other than racial bias, would be actionable under Section 1985(3).

The *Griffin* decision demonstrated the Supreme Court's serious concern over the creation of a general federal tort law should Section 1985(3) be literally interpreted; and, as a result the Court stated,

> The Constitutional shoals that would lie in the path of interpreting section 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment (incorporated into the section) . . .
>
> The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

Griffin, supra at 102, 91 S.Ct. at 1798.

The Seventh Circuit, in *Dombrowski v. Dowling*, 459 F.2d 190 at 195, in addressing the breadth of section 1985(3), found,

> The breadth of the statute's coverage is yet to be determined, but three categories of protected rights have been plainly identified. *Griffin* gives express recognition to a black citizen's Thirteenth Amendment rights and to his federal right to travel interstate; the title of the statute expressly identifies the third category, namely, rights protected by the Fourteenth Amendment.

The problem now before us does not involve an allegation of racial discrimination, nor an interference with the right to travel interstate. Rather, this Court is required to determine whether the Plaintiffs have shown a "class-based, invidiously discriminatory animus behind

the conspirators' action." *Griffin v. Breckenridge*, supra. The central inquiry here is whether discrimination against employees of a non-union entity is the kind of invidiously discriminatory motivation of the Court envisioned in *Griffin*.

It is the opinion of this Court that the Plaintiffs in the instant case have set out and proven a Section 1985(3) cause of action for the reasons hereafter stated.

In regard to the first requirement delineated by the *Griffin* decision necessary to have a Section 1985(3) cause of action, this Court finds that the Plaintiffs have established, and the facts show the existence of, a conspiracy by the Defendants. Elements of a conspiracy, agreement and intent, may be and often must be shown by circumstantial evidence. *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336 (9th Cir. 1970). It is well established that one can be a party to a conspiracy even though he does not know of the existence or identity of all his co-conspirators, and even though he does not participate in all of their acts. Once the conspiracy exists, co-conspirators of whom a party to the conspiracy is unaware can bind him by their actions. *United States v. Friedman*, 445 F.2d 1076 (9th Cir. 1971). It is not essential that each conspirator participate in all the activities of the conspirators in furtherance of the conspiracy or have knowledge of such activities. It is sufficient if the conspiracy is established and that the convicted persons knowingly contributed their efforts in furtherance of it. *McManaman v. United States*, 327 F.2d 21 (10th Cir. 1964). One who knowingly joins a conspiracy takes it as he finds it, with or without knowledge of what has gone on before. *Myzel v. Fields*, 386 F.2d 718 (8th Cir. 1967). All co-conspirators are liable for acts done during the continuance of the conspiracy and in furtherance of some purpose of the conspiracy even though the acts may have occurred without the knowledge of one of the defendants. *El Ranco*,

Inc. v. First National Bank of Nevada, 406 F.2d 1205 (9th Cir. 1968).

The violence perpetrated upon the Plaintiffs meets the second requisite set out in *Griffin*, i. e. a conspiracy "for the purposes of depriving another of equal protection or equal privileges and immunities." The Fifth Circuit, in *McLellan v. Mississippi Power and Light Co.*, 545 F.2d 919 (1977), held that two elements must be present in order to satisfy *Griffin's* second requirement, namely, (1) the private deprivation of the enjoyment of the laws, and (2) a class-based, discriminatory motivation. In determining what a private deprivation of the enjoyment of legal rights entails, the Fifth Circuit found that the inquiry must initially concentrate on the legality of the defendants' activity apart from section 1985(3).

> If the object of the defendants' conspiracy did not include a violation of some law (independent of section 1985(3) itself) which protects the plaintiff, the conspiracy could not have deprived the plaintiff of the 'protection of the laws.' Put more simply, there can only be a deprivation of the rights of a plaintiff when the action of the defendants is *otherwise* illegal.

McLellan, supra at 924-925.

We find that the conspiracy in the instant case clearly encompassed violations of both the civil and criminal laws of Texas. In addition, we find that the defendants engaged in the unlawful conduct they conspired to commit. The January 15, 1975 meeting and the actions leading to the attack upon the Alligator Bayou Station, the assault of the nonunion construction workers, and the destruction of the tools and equipment of Cross Construction Co., Inc. constituted a conspiracy. Clearly, the Defendants in this case have conspired to act contrary to law and therefore, the second element of section 1985(3) has not been met. In this, there can be no denial.

As noted earlier, the Supreme Court's *Griffin* decision declined to address the question of "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable" under section 1985(3). Nevertheless, some lower courts have held that various private conspiracies are actionable under the statute. E. g. *Richardson v. Miller*, 446 F.2d 1247 (3rd Cir. 1971); *Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973); *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) (en banc). The Fifth Circuit, in *McLellan*, declined to decide whether Congress intended that *only* racial bias would activate section 1985(3), although they did note that the Supreme Court's evident concern in *Griffin* over the broad literal sweep of the statute would dictate the exercise of restraint when a court is confronted with class-based discrimination grounded in a non-racial animus.

The requirement that there be some kind of class-based discriminatory animus behind the conspirator's actions presents the most difficult obstacle to a Plaintiff bringing a section 1985(3) action. To meet this requirement, the Plaintiffs contend that a conspiracy motivated by an invidiously discriminatory intent against non-union individuals and employers of these individuals is actionable under section 1985(3). To find for the plaintiffs, this Court must reach two separate conclusions. The Court must first decide whether the statute affords protection to classes drawn along lines other than race; and second, give an affirmative answer to the first, whether the Plaintiff's class—non-union laborers and the employer of those laborers—is a class within the ambit of Section 1985(3)'s protection.

This Court is persuaded that, while racial discrimination and the activities of the Ku Klux Klan were foremost on Congress' mind when it passed the Ku Klux Klan Act, the legislative branch sought to protect any individual of a discernable and definite class from discrimination and

violence directed toward him because of his membership in such class. From the Congressional Record, one can readily assume that section 1985(3) was intended to extend beyond racially based conspiracies and beyond the problems perceived to be pressing in 1871. Senator Edmunds, one of the proponents of a Bill which is now known as the Civil Rights Act of 1871 and which Section 1985(3) is based upon, remarked at a hearing on the issue,

> We do not undertake in this Bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter, . . . then this section could reach it.

42d Cong., 1st Sess. 567 (1871), reprinted in A. Avins, *The Reconstruction Amendments' Debates* 547 (1967).

Section 1981 and 1982 make specific reference to race and therefore have not been extended to non-racial discrimination, while section 1985(3) makes no such reference. In addition, the Sixth Circuit, in *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973), ruled that a supporter of a candidate for sheriff could maintain a section 1985(3) action against individuals who had interferred with the Plaintiff's exercise of Federal rights. Thus, this Court concludes that Congress did not intend to limit the protection of section 1985(3) to racial discrimination only. On the other hand, this Court would warn that the statute is not to be a panacea for discrimination. Rather, section 1985(3) is plainly addressed to discrimination which has at its foundation a "racial or perhaps otherwise class based, invidiously discriminatory animus" and that dis-

criminatory animus must be directed towards a definite and discernable class.

It is, therefore, incumbent upon the Plaintiffs in the instant case to next establish that they are members of a definite class which is protected by this section.

As noted above, the animus requisite for an action under section 1985(3) must be directed against a group or class having common characteristics of an inherent nature, not a congeries of persons who become a "class" by virtue of the denial to them of some advantage or their involvement in a single common kind of action. The statute is not designed to embrace *any* conspiracy that is aimed at two or more people with a single common trait.

Section 1985(3), it seems to us, lends itself only to those situations where the injury is class motivated and the class animus alleged must be consistent with the deprivation of rights alleged. The creation of a class of victims by tortious conduct does not, of itself, bring a claim within section 1985(3). To succeed, a Plaintiff must show a conspiracy entered into with intent to deny the class to which he belongs equal protection of the law, or an injury for lawfully expressing the right of any person to equal protection of the law.

This Court finds the Plaintiffs have met this requisite, in that they are members of a discernable class, to wit: non-union laborers and employers of non-union laborers. Likewise, this Court believes that men and women have the right to associate or not to associate with any group or class of individuals, and concomitantly, to be free of violent acts against their bodies and property because of such association or non-association.

Moreover, it is obvious, in this Court's mind, that the acts of violence upon these individuals in this case are manifestations of the ill-will and hatred these union members harbor toward non-union individuals, as well as, an

attempt by the unions to intimidate and coerce these non-union people from working or being employed within a "union area". This Court is convinced that the violence evidenced in this case constitutes discrimination and that it makes no difference whether the lines are drawn between Black and White, Protestant and Catholic, or union and non-union. In each case, the need for protection is of equal persuasion.

Therefore, it is the opinion of this Court that the Plaintiffs have clearly established a section 1985(3) claim and are entitled to damages.

The damages in this case can be divided into two types —immediate and consequential damages. Immediate damages being those to property and person which arise from a single occurrence, such as the destruction of equipment which can be repaired or replaced. The consequential damages are those suffered by the Plaintiff contractor, his construction contract and his contractual relations.

This Court finds immediate damages as follows: To Plaintiffs Paul E. Scott and James T. Matthews, $5,000.00 each for injuries sustained during the attack on January 17, 1975. To Cross Construction Company, $10,314.00 for damage to and loss of construction equipment. This award does not include those monies paid by Cross's insurance company for the custom-made office shack, five tool shacks and numerous small tools which were destroyed by the Defendants.

The consequential damages embrace those additional costs for insurance coverage and guard service forced upon Cross Construction Company due to the January 17 attack. We find that the increased insurance costs directly caused by this attack totals $27,089.44. This figure, proven at the trial, can be broken down as follows:

C11

Increased Insurance Cost to Cross Construction

Worker's Compensation Experience Modification	$14,030.00
Worker's Compensation Dividend	9,992.00
Contractors Equipment Premium Increase	2,067.44
Contractors Equipment Deductible	1,000.00
	27,089.44

We also find that Plaintiff Cross Construction Company incurred $49,982.00 in additional expenses for a security service. Not only did the property insurers and worker's compensation insurers refuse to write further coverage absent full-time security guard protection, but Cross's employees and his suppliers refused to come upon the job-site absent protection.

In addition, this Court directs that the Defendants pay the Plaintiff's attorneys fees in the amount of $25,000.00.

The Court finds that the Defendants in this case are jointly and severally liable for the above damages.

All costs shall be paid by the Defendants. Counsel for Plaintiffs shall submit an appropriate judgment consistent with the verdict of the Court, to be entered within thirty (30) days from this date.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civil Action No. B-75-26-CA

PAUL E. SCOTT, ET AL.,
Plaintiffs

VS.

BILL MOORE, ET AL.,
Defendants

FINAL JUDGMENT

Upon consideration of the pleadings, evidence, briefs, and oral argument of all parties herein by the Honorable Joe J. Fisher, Chief Judge, the Court's Memorandum Opinion was entered November 10, 1978. In accordance with the Court's Findings of Facts and Conclusions of Law, it is the Judgment of the Court and accordingly ORDERED, ADJUDGED and DECREED that:

1.

Paul E. Scott shall have and recover Five Thousand ($5,000.00) Dollars of and from defendants, Laborers International Union of North America, Local #870, Operative Plasterers and Cement Masons International Association, Local #884, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local #195, United Brotherhood of Carpenters and Joiners of America, Local #610, United Brotherhood of Carpenters and Joiners of America, Local #753, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL-CIO, Local #587, International Association of Bridge Structural and Ornamental

Ironworkers, Local #125, Sheet Metal Workers International Association, Local #196, Carpenters District Council of Sabine Area, International Brotherhood of Electrical Workers, Local #479, and International Union of Operating Engineers, Hoisting and Portable Engineers, AFL-CIO, Local #450.

2.

James T. Matthews shall have and recover Five Thousand ($5,000.00) Dollars of and from defendants, Laborers International Union of North America, Local #870, Operative Plasters and Cement Masons International Association, Local #884, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local #195, United Brotherhood of Carpenters and Joiners of America, Local #610, United Brotherhood of Carpenters and Joiners of America, Local #753, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL-CIO, Local #587, International Association of Bridge Structural and Ornamental Ironworkers, Local #125, Sheet Metal Workers International Association, Local #196, Carpenters District Council of Sabine Area, International Brotherhood of Electrical Workers, Local #479, and International Union of Operating Engineers, Hoisting and Portable Engineers, AFL-CIO, Local #450.

3.

A. A. Cross Construction Co., Inc. shall have and recover One Hundred Twelve Thousand Three Hundred Eighty-Five and 14/100 ($112,385.14) Dollars of and from defendants, Laborers International Union of North America, Local #870, Operative Plasters and Cement Masons International Association, Local #884, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local #195, United Brotherhood of Carpen-

ters and Joiners of America, Local #610, United Brotherhood of Carpenters and Joiners of America, Local #753, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL-CIO, Local #587, International Association of Bridge Structural and Ornamental Ironworkers, Local #125, Sheet Metal Workers International Association, Local #196, Carpenters District Council of Sabine Area, International Brotherhood of Electrical Workers, Local #479, and International Union of Operating Engineers, Hoisting and Portable Engineers, AFL-CIO, Local #450.

4.

It is further ORDERED, ADJUDGED and DECREED that defendants, International Association of Heat and Frost Insulators and Asbestos Workers, Local #22, International Association of Heat and Frost Insulators and Asbestos Workers, Local #112, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL-CIO, Local #587, Bricklayers, Masons, and Plasters International Union, Local #13, United Brotherhood of Carpenters and Joiners of America, Local #610, United Brotherhood of Carpenters and Joiners of America, Local #753, United Brotherhood of Carpenters and Joiners of America, Local #2007, Operative Plasters and Cement Masons International Association, Local #884, Operative Plasters and Cement Masons International Association, Local #804, Wood, Wire and Metal Lathers International Union, Local #416, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local #2484, International Union of Operating Engineers, Hoisting and Portable Engineers, AFL-CIO, Local #450, International Brotherhood of Painters and Allied Trades, Local #328, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States

and Canada, Local #1347, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local #195, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local #504, International Brotherhood of Electrical Workers, Local #479, International Association of Bridge Structural and Ornamental Ironworkers, Local #125, Laborers International Union of North America, Local #852, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, Local #116, Sheet Metal Workers International Association, Local #196, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, Local #920, Laborers International Union of North America, Local #870, and Sabine Area Building Trades Council, and all persons, firms, and associations combining or conspiring with said defendants, and all persons having notice of this Order, are hereby permanently enjoined from and shall not hereafter combine, conspire, threaten, intimidate, assault, or commit any act of violence toward or upon any person, property or possession of any person or his family who may work upon, travel to, deliver materials, goods, or services to A. A. Cross Construction Co., Inc., or to the site of the Alligator Bayou Pump Station on Taylor's Bayou near Port Arthur, Jefferson County, Texas.

5.

All costs herein are assessed against the defendants, Laborers International Union of North America, Local #870, Operative Plasters and Cement Masons International Association, Local #884, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local #195, United Brotherhood of Carpenters and Joiners of America, Local #610, United Brotherhood of Carpenters and Joiners of America, Local #753, International Broth-

erhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL-CIO, Local #587, International Association of Bridge Structural and Ornamental Ironworkers, Local #125, Sheet Metal Workers International Association, Local #196, Carpenters District Council of Sabine Area, International Brotherhood of Electrical Workers, Local #479, and International Union of Operating Engineers, Hoisting and Portable Engineers, AFL-CIO, Local #450.

DONE this 19th day of December, 1978.

/s/ Joe J. Fisher
JOE J. FISHER
Chief Judge
United States District Court

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*
REVISED 6/4/82

No. 79-1196

D.C. Docket No. CA-B-75-26

PAUL E. SCOTT, ET AL.,
Plaintiffs-Appellees,
versus
BILL MOORE, ET AL.,
Defendants,

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL #870, ET AL.,
Defendants-Appellants,

INTERNATIONAL UNION OF OPERATING ENGINEERS, ETC., AFL-CIO, LOCAL 450,
Defendant-Appellant.

Appeal from the United States District Court
for the
Eastern District of Texas

Before GODBOLD, Chief Judge, BROWN, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, JR., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A. CLARK, WILLIAMS and GARWOOD, Circuit Judges.

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* Former Fifth Circuit case, section 9(1) of Public Law 96-452, October 14, 1980.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc, with oral argument;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by the Court that the opinion entered by a panel of this Court on March 26, 1981, affirming in part and reversing in part the judgment of the said District Court in this cause be, and the same is hereby affirmed in part and reversed in part by the Court en banc.

IT IS FURTHER ORDERED that the defendants-appellants, Carpenters, Local 610, Pipefitters Local 195 and Carpenters Local 753, pay to the plaintiffs-appellees the costs on appeal, to be taxed by the Clerk of this Court.

July 1, 1982

RUBIN and WILLIAMS, Circuit Judges, with whom BROWN, VANCE, KRAVITCH, RANDALL, TATE and SAM D. JOHNSON, Circuit Judges, join, dissenting.

ANDERSON, Circuit Judge, dissenting.

GARWOOD, Circuit Judge, dissenting.

ISSUED AS MANDATE:

Office-Supreme Court, U.S.
FILED
FEB
ALEXANDER L. STEVAS,
CLERK

No. 82-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED BROTHERHOOD OF CARPENTERS and JOINERS OF AMERICA, LOCAL 610 (AFL-CIO), *et al.*,
Petitioners,

v.

PAUL E. SCOTT, *et al.*,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

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JOINT APPENDIX

LAURENCE GOLD
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PETITION FOR A WRIT OF CERTIORARI FILED 9/20/1982
PETITION FOR A WRIT OF CERTIORARI GRANTED 11/29/1982

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LIST OF RELEVANT DOCKET ENTRIES

Original Complaint filed: 1/3/1975

Hearing on Application for a Restraining Order: 1/31/75

Restraining Order Issued: 1/31/1975

Application for a Restraining Order Granted: 1/31/1975

Preliminary Injunction Issued: 2/27/1975

Order Granting Plaintiffs Motion To File An Amended Complaint Granted: 12/13/1976

Defendants Motions to Dismiss filed: 1/11/1977 to 2/14/1977

Trial: 4/27/1977 to 4/29/1977

Memorandum Opinion of the District Court issued: 11/17/1978

Final Judgment issued: 12/19/1978

Notice of Appeal filed: 7/12/79

Court of Appeals Panel Opinion issued: 3/26/1981

Order Granting Rehearing En Banc issued: 8/31/1981

Court of Appeals En Banc Opinion and Judgment issued: 7/1/1982

Petition for a Writ of Certiorari filed: 9/20/1982

Petition for a Writ of Certiorari granted: 11/29/1982

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civil Action No. B-75-26-CA

PAUL E. SCOTT, *et al.*,
Plaintiffs

v.

BILL MOORE, *et al.*,
Defendants

[Filed Dec. 13, 1976]

AMENDED COMPLAINT

COME NOW Paul E. Scott, James T. Matthews and A. A. Cross Construction Company, Inc., plaintiffs, and with leave of Court make and file this first amended complaint and would respectfully show to the Court:

I.

PARTIES

1. Plaintiff, Paul E. Scott, is a citizen of the United States, now living in Port Arthur, Texas.

2. Plaintiff, James T. Matthews, is a citizen of the United States, now living in Port Arthur, Texas.

3. Plaintiff, A. A. Cross Construction Company, Inc. is a Texas corporation, actually engaged in work within the Eastern District of Texas.

4. Defendants, Bill Moore, Robert Wayne Faulk, Bruce Hill, Curtis Beasley, Jay Desormeaux, Fish Ferguson, John Wallace, Jr., Asbestos Workers Local #22, Asbestos Workers Local #112, Boilermakers Local #587, Bricklayer's Local #13, Carpenters Local #610, Carpenters Local #753, Carpenters Local #2007, Cement Masons

Local #804, Cement Masons Local #884, Lather Workers Local #416, Millwrights Local #2484, Operating Engineers Local #450, Painters Local #243, Painters Local #328, Piledrivers Local #1347, Pipefitters Local #195, Plumbers Local #504, Electricians Local #479, Ironworkers Local #125, Laborers Local #852, Roofers Local #116, Sheetmetal Workers Local #198, Teamsters Local #920, Labor's Local #870 and Sabine Area Building Trades Council.

II.

JURISDICTION AND VENUE

This is a suit by plaintiffs individually and as a class representatives for injunction and damages.

III.

CLASS ACTION

Plaintiffs bring this action on their own behalf and as representatives of a class as defined in Rule 23, Federal Rules of Civil Procedure. This class may be defined as being composed of four categories or sub-classes of plaintiffs consisting of:

(a) All persons presently employed by A. A. Cross Construction Company, Inc. (hereinafter called "Cross"), their wives and children;

(b) All persons, together with their wives and children, who may become employed by Cross and perform work leading to construction of the Alligator Bayou Pump Station on the hurricane protection levee along Taylor's Bayou near Port Arthur, Jefferson County, Texas.

(c) All persons, their wives and children, and all firms and corporations who may supply, deliver, or provide labor, materials, goods or services to Cross or others for construction of the Alligator Bayou Pump Station;

(d) All persons, their wives and children, who may lawfully be present upon the site of the Alligator Bayou Pump Station, or the ways leading thereto.

IV.

BACKGROUND OF CONTROVERSY

A. Plaintiffs are employees of A. A. Cross Construction Company, Inc., and have been for more than five months. Cross has a contract with the U.S. Army Corps of Engineers to build a pump station known as the Alligator Bayou Pump Station on the hurricane protection levee along Taylor's Bayou at Alligator Bayou, near Port Arthur, in Jefferson County, Texas. This pump station (costing more than $8,000,000.00) is a part of the hurricane protection system designed and under construction to protect the lives and property of the residents of Port Arthur and south Jefferson County, Texas.

B. The normal vehicular entrance to the Alligator Bayou Pump Station is not along a public road. Rather, entrance is gained only be permissive use of a levee road or haul road under the control of either the U.S. Army Corps of Engineers, Jefferson County Drainage District No. 7, or McGinnes Brothers Construction Company (the firm constructing the levee). The levee road is accessible from Texas Highway 73 in Port Arthur, Texas.

C. Several days before January 17, 1975, plaintiffs had been told by defendant Moore and others, that unless their employer, Cross, entered into a contract with local labor unions governing the terms and conditions of work to be performed on the Alligator Bayou Pump Station, that "there will be trouble", that "you cannot do this job non-union", that "we will get you", and "your wives and children", and "we're going to run you out of this country one way or the other".

At the time of these threats, and similar threats by others, there was no labor dispute involving Cross, its

employees, or the construction project. There was not a picket line, there were no negotiations, representations elections or any other related activity.

Plaintiffs and those they represent were working on a daily basis at the pump station site. They were earning wages at a rate certified by the U.S. Secretary of Labor as the "prevailing wage rate" in the area for the crafts involved. Each day, weather permitting, the class of plaintiffs traveled from their homes to the job site, performing their duties.

D. On January 16, 1975, plaintiffs heard rumors that the next morning certain of the local trades unions or labor council were going to meet near the entrance to the job site on Highway 73 and picket the entrance to the levee road. Almost all of the Cross employees on the job site were so advised of these rumors.

On January 17, 1975, plaintiffs, who are Cross employees, went to work about 6:00 a.m., one hour earlier than normal. When they arrived at the Highway 73 entrance, there was no picket line. There were no people congregated. However, there were several cars and people coming together along Highway 73 at a road east of the levee road leading to the pump station. The Cross employees went to their work site unhindered and unmolested.

E. Between 6:00 and 7:00 A.M., January 17, 1975, a crowd of men—approximately 300 strong—amassed on Highway 73 at and near the entrance to the levee road leading to Cross' job site. Still, no picket signs or other indicia of any lawful dispute were evidenced.

Shortly after 7:00 A.M., January 17, 1975, plaintiffs and their fellow employees were at work when they were attacked by several truck loads of men who emerged from the crowd amassed at Highway 73.

These attackers came driving up the levee road. When they got to the Cross site, they jumped off the pickup trucks and started hollering and shouting all manner of obscenities and epithets at the plaintiffs, and ordered plaintiffs, gestapo style, to leave the job site.

Plaintiffs and their fellow workers complied instantly. They were out-numbered more than three-to-one by the attackers. They offered no resistance whatsoever. However, before they could leave the job site, plaintiffs and their fellow employees were assaulted and beaten with clubs, two-by-fours and iron bars. Their tools and equipment were smashed. Their trucks and cars were beaten—virtually all glass being broken out—their property was destroyed as they were forcefully driven from their work.

Finally, after their tools were bent and broken, their office trailer was turned over and burned, destroying even the payroll records of plaintiffs' service to their employer.

Nine of plaintiffs were physically injured. Six men required immediate medical treatment. At least one man is still suffering debilitating effects of a severe head injury.

F. Plaintiffs have been advised by responsible law enforcement officers that they can expect additional attacks and acts of violence upon themselves and members of their families, either at the job site, their homes or the public streets and highways leading thereto; all arising out of plaintiffs engaging in a totally lawful performance of their work on the construction of a public facility.

V.

DEFENDANTS

Defendants, and others acting in concert with them, combined, conspired and participated in the acts complained of herein.

VI.

LEGAL CAUSE OF ACTION

Plaintiffs, and those they represent, are members of an identifiable class of persons described in this complaint. Defendants, and others acting in concert, combination and conspiracy with them have conspired and effectuated the object of their conspiracy by threats, assaults, and burnings to deprive plaintiffs of the basic rights that the law secures to all free men.

Defendants, actuated by a class-based invidiously discriminatory animus, have denied and seek to continue to deny plaintiffs' equal protection of the laws of Texas and the United States, including the right to work, the right to speech, the right to association, assembly, security of person, interstate travel, and the right not to be deprived of life, liberty or property without due process of law.

VII.

INJUNCTION

Plaintiffs have no adequate remedy at law against the common design and conspiracy of defendants and others. Plaintiffs have attempted to locate and contact defendants—unsuccessfully. Unless the Court grants a temporary restraining order, the acts of these marauders will continue unabated, and the lives and property of plaintiffs will be expropriated outside the law.

VIII.

DAMAGES

Plaintiffs would further show that on account of the acts, wrongs, omissions and conduct described above plaintiffs, and particularly A. A. Cross Construction Co., Inc., experienced damages in excess of One Hundred Thousand ($100,000.00) Dollars, for which it hear and now prays.

WHEREFORE, PREMISES CONSIDERED, plaintiffs pray:

(1) That defendants, and all persons acting in concert with them, or to whom knowledge thereof is conveyed, be enjoined and restrained from conspiring, threatening or attempting to threaten, assault, damage or hinder the free movement of any persons, or the family, property or possessions of any person who may now or hereafter work upon, travel to, supply labor or materials to or for instruction of the Alligator Bayou Pump Station near Port Arthur, Texas;

(2) That the defendants be cited to appear herein;

(3) That the Court immediately grant a temporary restraining order, and set a time and place whereupon a hearing for preliminary injunction can be held;

(4) That the Court grant a preliminary injunction as aforesaid;

(5) Upon a final trial and hearing hereof that the Court grant a permanent injunction in the premises;

(6) That such other and further orders and writs as are necessary to insure the safety, lives and equal protection of plaintiffs issue to enforce the judgment and process of this Honorable Court;

(7) That plaintiffs have their costs of Court and such other relief as is just and proper in the premises.

(8) That plaintiffs recover their damages.

Respectfully submitted,

MEHAFFY, WEBER, KEITH
& GONSOULIN
Attorneys for Plaintiffs

By /s/ Roy V. G. Keith
Of Counsel

1400 San Jacinto Building
Beaumont, Texas 77701

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civil Action No. B-75-26-CA

PAUL E. SCOTT *et al.*

vs.

BILL MOORE *et al.*

ORIGINAL ANSWER OF DEFENDANTS, CARPENTERS LOCAL #610—JOHN WALLACE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW CARPENTERS LOCAL #610—JOHN WALLACE, defendants in the above entitled and numbered cause, and in answer to the plaintiff's complaint heretofore filed, would respectfully show unto the Court the following:

I.

PARTIES

(1) These defendants neither admit or deny subsection (1) of Paragraph I of plaintiff's complaint for lack of knowledge.

(2) These defendants neither admit or deny subsection (2) of Paragraph I of plaintiff's complaint for lack of knowledge.

(3) These defendants admit subsection (3) of Paragraph I of plaintiff's complaint.

II.

JURISDICTION AND VENUE

These defendants deny subsection (1) of Paragraph II of plaintiff's complaint in its entirety.

III.

CLASS ACTION

These defendants deny Paragraph III of plaintiff's complaint that it is properly brought as a class action.

IV.

BACKGROUND OF CONTROVERSY

(A) These defendants neither admit or deny subsection (A) of Paragraph IV of plaintiff's complaint for lack of knowledge.

(B) These defendants neither admit or deny subsection (B) of Paragraph IV of plaintiff's complaint for lack of knowledge.

(C) These defendants deny subsection (C) of Paragraph IV of plaintiff's complaint.

(D) These defendants deny subsection (D) of Paragraph IV of plaintiff's complaint.

(E) These defendants deny subsection (E) of Paragraph IV of plaintiff's complaint.

(F) These defendants deny subsection (F) of Paragraph IV of plaintiff's complaint.

V.

DEFENDANTS

These defendants deny Paragraph V of plaintiff's complaint in its entirety.

VI.

LEGAL CAUSE OF ACTION

These defendants deny Paragraph VI of plaintiff's complaint in its entirety.

VII.

INJUNCTION

These defendants deny Paragraph VII of plaintiff's complaint in its entirety.

VIII.

DAMAGES

These defendants deny Paragraph VIII of plaintiff's complaint in its entirety.

Respectfully submitted,

STEPHENSON, THOMPSON & DIES

By /s/ Martin W. Dies
MARTIN W. DIES
Attorneys for Named Defendants

712 Division St.,
Orange, Texas 77630

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civil Action No. B-75-26-CA

PAUL E. SCOTT *et al.*

vs.

BILL MOORE *et al.*

ORIGINAL ANSWER OF DEFENDANTS, CARPENTERS LOCAL #753—W. H. CARR

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW CARPENTERS LOCAL #753—W. H. CARR, defendants in the above entitled and numbered cause, and in answer to the plaintiff's complaint heretofore filed, would respectfully show unto the Court the following:

I.

PARTIES

(1) These defendants neither admit or deny subsection (1) of Paragraph I of plaintiff's complaint for lack of knowledge.

(2) These defendants neither admit or deny subsection (2) of Paragraph I of plaintiff's complaint for lack of knowledge.

(3) These defendants admit subsection (3) of Paragraph I of plaintiff's complaint.

II.

JURISDICTION AND VENUE

These defendants deny subsection (1) of Paragraph II of plaintiff's complaint in its entirety.

III.

CLASS ACTION

These defendants deny Paragraph III of plaintiff's complaint that it is properly brought as a class action.

IV.

BACKGROUND OF CONTROVERSY

(A) These defendants neither admit or deny subsection (A) of Paragraph IV of plaintiff's complaint for lack of knowledge.

(B) These defendants neither admit or deny subsection (B) of Paragraph IV of plaintiff's complaint for lack of knowledge.

(C) These defendants deny subsection (C) of Paragraph IV of plaintiff's complaint.

(D) These defendants deny subsection (D) of Paragraph IV of plaintiff's complaint.

(E) These defendants deny subsection (E) of Paragraph IV of plaintiff's complaint.

(F) These defendants deny subsection (F) of Paragraph IV of plaintiff's complaint.

V.

DEFENDANTS

These defendants deny Paragraph V of plaintiff's complaint in its entirety.

VI.

LEGAL CAUSE OF ACTION

These defendants deny Paragraph VI of plaintiff's complaint in its entirety.

VII.

INJUNCTION

These defendants deny Paragraph VII of plaintiff's complaint in its entirety.

VIII.

DAMAGES

These defendants deny Paragraph VIII of plaintiff's complaint in its entirety.

Respectfully submitted,

STEPHENSON, THOMPSON & DIES

By /s/ Martin W. Dies
MARTIN W. DIES
Attorneys for Named Defendants

712 Division St.,
Orange, Texas 77630

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civil Action No. B-75-26-CA

PAUL E. SCOTT *et al.*,
Plaintiffs,

vs.

BILL MOORE *et al.*,
Defendants.

MOTION TO DISMISS

COMES NOW Sabine Area Building Trades Council, AFL-CIO, Co-Defendant in the civil action styled and captioned above, and pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, presents herewith its Motion to Dismiss, and in support thereof, would respectfully show unto the Court as follows:

I.

The Amended Complaint, as against Sabine Area Building Trades Council, fails to allege jurisdiction of this Court over the subject matter, and within its own parameters, discloses lack of Federal jurisdiction, and must accordingly be dismissed in its entirety pursuant to Rule 12(b)(1).

More specifically:

(1) Federal jurisdiction must be alleged,[1] established,[2] and is never assumed,[3] for Federal jurisdiction is not plenary.[4] The Amended Complaint served upon the Co-

[1] Page 1 of Memorandum of Points and Authorities.

[2] Page 2 of Memorandum of Points and Authorities.

[3] Pages 2 and 3 of Memorandum of Points and Authorities.

[4] Page 3 of Memorandum of Points and Authorities.

Defendant herein, being the *only pleading served upon this Co-Defendant, fails altogether to alleged Federal jurisdiction. For this reason alone, it must be dismissed.*[5]

(2) The Amended Complaint clearly *alleges* (*Paragraph C, Page 3*) a labor dispute, and the Amended Complaint clearly seeks an injunction (Paragraph 7, Page 6). By definition, from the phrase of the Amended Complaint, an injunction is sought against Co-Defendant Sabine Area Building Trades Council, a labor organization within the meaning of Section 2(11) of the National Labor Relations Act, as amended, 29 U.S.C. 104, expressly provides that the District Courts of the United States shall have no jurisdiction to issue such injunctions.[6] Seven exceptions to the absolute rule of the Norris-LaGuardia Act have been enacted by Congress, being Section 8(b)(4)(i)(ii)(A), Section 8(b)(4)(ii)(B), Section 8(b)(7)(A), Section 8(b)(7)(B), and Section 8(b)(7)(C), of the National Labor Relations Act, As Amended, and one exception has been judicially created by the decision of the United States Supreme Court in the case of *Boy's Markets vs. Retail Clerks Union*, 398 U.S. 235. None of these exceptions are alleged in the Amended Complaint, and concomitantly, the context of the Amended Complaint rules out the possibility of any such exception.

(3) While no duty devolves upon this Defendant to rule out other possibilities for Federal jurisdiction, the context of the Amended Complaint amply discloses that the action is not, and cannot be, brought pursuant to Section 301 of the National Labor Relations Act, as any breach of contract, or pursuant to Section 303(b) of the National Labor Relations Act, alleging a violation of Section 8(b)(4)(ii)(A,B,C or D) of the Act, and again from the caption alone it is ascertainable that no Regional Director of the National Labor Relations Board

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[5] Page 3 of Memorandum of Points and Authorities.

[6] Pages 3 and 4 or Memorandum of Points and Authorities.

is petitioning pursuant to Section 10(1)[7] of the National Labor Relations Act. Accordingly, all Federal jurisdiction peculiar to labor relations is ruled out. Since the Amended Complaint alleges a labor dispute, since an employer is among Plaintiffs, and since this Defendant is a labor organization, the express provisions of 29 U.S.C. 104 expressly apply, *a fortiari.*

(4) Federal jurisdiction cannot be maintained pursuant to 28 U.S.C. 1331 as there is no Federal question involved upon which to base jurisdiction.

(5) Federal jurisdiction cannot be maintained under either 28 U.S.C. 1343 or 42 U.S.C. 1985 (3), as the Amended Complaint fails to allege and set forth with particularity material facts showing a purposeful discrimination in the deprivation of constitutional rights, and additionally fails to allege that any such deprivation occurred under color of State Law, as required by Section 1343. Section 1085(3) has been judicially interpreted to require that the Amended Complaint allege that Defendants acted or claim to act under color of law.[8] Plaintiff's Amended Complaint makes no such allegation.

Therefore, Petitioner's Amended Complaint, as against Co-Defendants Sabine Area Building Trades Council, must be dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure for total lack of jurisdiction.

II.

The Complaint, as against Co-Defendant Sabine Area Building Trades Council, fails to allege that this Court has jurisdiction over the person, pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure in that Co-Defendant Sabine Area Building Trades Council is

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[7] Page 4 of Memorandum of Points and Authorities.

[8] Page 4 of Memorandum of Points and Authorities.

being sued on behalf of unnamed and unknown persons without any allegation of agency being set forth in the Amended Complaint, and additionally Defendants are for the most part not even named.

III.

The Amended Complaint, as against Co-Defendant Sabine Area Building Trades Council, completely fails to make any allegations whatsoever as to venue.

IV.

The Amended Complaint, as against Co-Defendant Sabine Area Building Trades Council, should be dismissed under Rule 12(b) (4) of the Federal Rules of Civil Procedure for insufficiency of process, as numerous Defendants have not been served.

V.

The Amended Complaint, as against Co-Defendant Sabine Area Building Trades Council, should be dismissed under Rule 12(b) (5) of the Federal Rules of Civil Procedure for insufficiency of service of process, in that numerous Defendants have not been served.

VI.

The Amended Complaint, as against Co-Defendant Sabine Area Building Trades Council, should be dismissed under Rule 12(b) (6) as the Amended Complaint fails to state a cause of action upon which relief can be granted, as shown by all of the aforementioned defenses. (i.e. (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted)

The Amended Complaint fails to disclose any proper allegation or definition of a class action pursuant to Rule

23. The class action is inadequately pled and cannot be maintained as it fails to disclose the requisite elements of ascertainment, numerosity, and commonality.

Additionally, the Amended Complaint seeks to include in a class action unnamed and unknown persons who sometime in the future may happen across that particular part of property described in Plaintiff's Amended Complaint.

The Amended Complaint must be dismissed as it is pled in such a manner that it cannot be either admitted or denied, is a rambling narrative rather than a sequence of numbered allegations, and contains phrases inappropriate to Federal pleadings such as "gestapo style" action, which phrase has no place in any pleading before the United States District Court.

Plaintiff's Amended Complaint does not describe a cause of action cognizable under any Federal statute. In effect, it describes only that some violence occurred between unnamed parties, and thus, *prima facie*, jurisdiction is with state authorities.

The Defendants are not named with any specificity in Plaintiff's Amended Complaint.

To the extent that any meaning can be gleaned from this rambling narrative, the pleading is conclusionary, *en toto*.

Plaintiff's Amended Complaint fails to substantiate that they are without an adequate remedy at law, and more specifically, Plaintiffs have not exhausted their State Court remedies.

Plaintiffs Amended Complaint should be dismissed under Rule 12(b)(7) of the Federal Rules of Civil Procedure in that it fails to join Defendants who apparently are the parties who engaged in the violence alleged in the Amended Complaint.

WHEREFORE, PREMISES CONSIDERED, Co-Defendant Sabine Area Building Trades Council prays that this Complaint be dismissed in its entirety, and that Plaintiffs take nothing by way of this suit, and further, that Co-Defendant Sabine Area Building Trades Council, having been put to great legal expense and vexation, be entitled therefore to reasonable attorneys fees.

Respectfully submitted,

/s/ Wm. N. Wheat
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915 Goodhue Building
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(713) 833-5636

Of Counsel:

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(713) 659-3944

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civil Action No. B-75-26-CA

PAUL E. SCOTT, *et al.*,
Plaintiffs,

vs.

BILL MOORE, *et al.*,
Defendants.

MOTION TO DISMISS

COMES NOW United Association of Plumbing and Pipefitting Industry, Local Union 195, Co-Defendant in the civil action styled and captioned above, and pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, presents herewith its Motion to Dismiss, and in support thereof, would respectfully show unto the Court as follows:

I.

The Amended Complaint, as against United Association of Plumbing and Pipefitting Industry, Local Union 195, fails to allege jurisdiction of this Court over the subject matter, and within its own parameters, discloses lack of Federal jurisdiction, and must accordingly be dismissed in its entirety pursuant to Rule 12(b)(1).

More specifically:

(1) Federal jurisdiction must be alleged,[1] established,[2] and is never assumed,[3] for Federal jurisdiction is not plenary.[4] The Amended Complaint served upon the Co-

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[1] Page 1 of Memorandum of Points and Authorities.

[2] Page 2 of Memorandum of Points and Authorities.

[3] Pages 2, 3 of Memorandum of Points and Authorities.

[4] Page 3 of Memorandum of Points and Authorities.

Defendant herein, being the *only pleading served upon this Co-Defendant, fails altogether to allege Federal jurisdiction. For this reason alone, it must be dismissed.*[5]

(2) The Amended Complaint clearly *alleges* (Paragraph C, Page 3) a labor dispute, and the Amended Complaint clearly seeks an injunction (Paragraph 7, Page 6). By definition, from the phrase of the Amended Complaint, an injunction is sought against Co-Defendant United Association of Plumbing and Pipefitting Industry, Local 195, a labor organization within the meaning of Section 2(11) of the National Labor Relations Act, as amended, 29 U.S.C. 104, expressly provides that the District Courts of the United States shall have no jurisdiction to issue such injunctions.[6] Seven exceptions to the absolute rule of the Norris-LaGuardia Act have been enacted by Congress, being Section 8(b)(4)(i)(ii)(A), Section 8(b)(4)(ii)(B), Section 8(b)(7)(A), Section 8(b)(7)(B), and Section 8(B)(7)(C), of the National Labor Relations Act, As Amended, and one exception has been judicially created by the decision of the United States Supreme Court in the case of *Boy's Markets vs. Retail Clerks Union*, 398 U.S.C. 235. None of these exceptions are alleged in the Amended Complaint, and concomitantly, the context of the Amended Complaint rules out the possibility of any such exception.

(3) While no duty devolves upon this Defendant to rule out other possibilities for Federal jurisdiction, the context of the Amended Complaint amply discloses that the action is not, and cannot be, brought pursuant to Section 301 of the National Labor Relations Act, as any breach of contract, or pursuant to Section 303(b) of the National Labor Relations Act, alleging violation of Section 8(b)(4)(i)(ii)(A,B,C, or D) of the Act, and again from the caption alone it is ascertainable that no Re-

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[5] Page 3 of Memorandum of Points and Authorities.

[6] Page 3, 4 of Memorandum of Points and Authorities.

gional Director of the National Labor Relations Board is petitioning pursuant to Section 10(I)[7] of the National Labor Relations Act. Accordingly, all Federal jurisdiction peculiar to labor relations is ruled out. Since the Amended Complaint alleges a labor dispute, since an employer is among Plaintiffs, and since this Defendant is a labor organization the express provisions of 29 U.S.C. 104 expressly apply, *a fortiari.*

(4) Federal jurisdiction cannot be maintained pursuant to 29 U.S.C. 1331 as there is no Federal question involved upon which to base jurisdiction.

(5) Federal jurisdiction cannot be maintained under either 28 U.S.C. 1343 or 42 U.S.C. 1985(3), as the Amended Complaint fails to allege and set forth with particularity material facts showing a purposeful discrimination in the deprivation of constitutional rights, and additionally fails to allege that any such deprivation occurred under color of State Law, as required by Section 1343. Section 1985(3) has been judicially interpreted to require that the Amended Complaint allege that Defendants acted or claim to act under color of law.[8] Plaintiff's Amended Complaint makes no such allegation.

Therefore, Petitioner's Amended Complaint, as against Co-Defendants United Association of Plumbing and Pipefitting Industry, Local Union 195, must be dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure for total lack of jurisdiction.

II.

The Amended Complaint, as against Co-Defendant United Association of Plumbing and Pipefitting Industry, Local Union 195, fails to allege that this Court has jurisdiction over the person, pursuant to Rule 12(b)(2) of

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[7] Page 4, of Memorandum of Points and Authorities.

[8] Page 4 of Memorandum of Points and Authorities.

the Federal Rules of Civil Procedure in that Co-Defendant United Association of Plumbing and Pipefitting Industry, Local Union 195 is being sued on behalf of unnamed and unknown persons without any allegation of agency being set forth in the Amended Complaint, and additionally Defendants are for the most part not even named.

III.

The Amended Complaint, as against Co-Defendant United Association of Plumbing and Pipefitting Industry, Local Union 195, completely fails to make any allegations whatsoever as to venue.

IV.

The Amended Complaint, as against Co-Defendant United Association of Plumbing and Pipefitting Industry, Local Union 195, should be dismissed under Rule 12(b)(4) of the Federal Rules of Civil Procedure for insufficiency of process, as numerous Defendants have not been served.

V.

The Amended Complaint, as against Co-Defendant United Association of Plumbing and Pipefitting Industry, Local Union 195, should be dismissed under Rule 12(b)(5) of the Federal Rules of Civil Procedure for insufficiency of service of process, in that numerous Defendants have not been served.

VI.

The Amended Complaint, as against Co-Defendant United Association of Plumbing and Pipefitting Industry, Local Union 195, should be dismissed under Rule 12(b)(6) as the Amended Complaint fails to state a cause of action upon which relief can be granted as shown by all of the aforementioned defenses. (i.e.(1)lack of jurisdiction over the subject matter, (2)lack of juris-

diction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted.)

The Amended Complaint fails to disclose any proper allegation or definition of a class action pursuant to Rule 23. The class action is inadequately pled and cannot be maintained as it fails to disclose the requisite elements of ascertainment, numerosity, and commonality.

Additionally, the Amended Complaint seeks to include in a class action unnamed and unknown persons who sometime in the future may happen across that particular part of property described in Plaintiff's Amended Complaint.

The Amended Complaint must be dismissed as it is pled in such a manner that it cannot be either admitted or denied, is a rambling narrative rather than a sequence of numbered allegations, and contains phrases inappropriate to Federal pleadings such as "gestapo style" action, which phrase has no place in any pleading before the United States District Court.

Plaintiff's Amended Complaint does not describe a cause of action cognizable under any Federal statute. In effect, it describes only that some violence occurred between unnamed parties, and thus, *prima facie*, jurisdiction is with state authorities.

The Defendants are not named with any specificity in Plaintiff's Amended Complaint.

To the extent that any meaning can be gleaned from this rambling narrative, the pleading is conclusionary, *en toto.*

Plaintiff's Amended Complaint should be dismissed under Rule 12(b)(7) of the Federal Rules of Civil Procedure in that it fails to join Defendants who apparently are the parties who engaged in the violence alleged in the Amended Complaint.

WHEREFORE, PREMISES CONSIDERED, Co-Defendant United Association of Plumbing and Pipefitting Industry, Local Union 195, prays that this Complaint be dismissed in its entirety, and that Plaintiffs take nothing by way of this suit, and further, that Co-Defendant United Association of Plumbing and Pipefitting Industry, Local Union 195, having been put to great legal expense and vexation, be entitled therefore to reasonable attorneys fees.

Respectfully submitted,

/s/ Wm. N. Wheat
WILLIAM N. WHEAT
Attorney in Charge
915 Goodhue Bldg.
Beaumont, Texas
(713) 833-5636

Of Counsel:

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(713) 659-3944

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civil Action No. B-75-26-CA

PAUL E. SCOTT *et al.*

vs.

BILL MOORE *et al.*

MOTION TO DISMISS

Comes now the following defendants herein, CARPENTERS LOCAL #753; CARPENTERS LOCAL #2007; CARPENTERS LOCAL #610; MILLWRIGHTS LOCAL #2484; PILEDRIVERS LOCAL #1347; IRONWORKERS LOCAL #125; SHEETMETAL WORKERS LOCAL #196; BOILERMAKERS LOCAL #587; AND PLUMBERS LOCAL #504, and make and file this their motion to dismiss, showing unto the Court as follows:

1.

These defendants adopt and incorporate herein by reference the motions to dismiss heretofore filed herein by the other defendants in this case, which are presently under consideration by the Court, and these defendants move for dismissal as to them upon the same ground and pursuant to the same authorities relied upon by the other defendants in their respective motions.

WHEREFORE, PREMISES CONSIDERED, the defendants, CARPENTERS LOCAL #753; CARPENTERS LOCAL #2007; CARPENTERS LOCAL #610; MILLWRIGHTS LOCAL #2484; PILEDRIVERS LOCAL #1347; IRONWORKERS LOCAL #125; SHEETMETAL WORKERS LOCAL #196; BOILERMAKERS LOCAL #587; and PLUMBERS LOCAL #504 move

and pray that this action be in all things dismissed as to said defendants, and these defendants recover their costs and any other relief to which they may be entitled.

Respectfully submitted,

/s/ Martin W. Dies
MARTIN W. DIES
712 Division Street
Orange, Texas 77630

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Office - Supreme Court, U.S.
FILED
NOV 5 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BILL MOORE, ET AL,
Defendants-Petitioners,

v.

PAUL E. SCOTT, ET AL,
Plaintiffs-Respondents.

Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Of Counsel:

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Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTIONS PRESENTED

1. Whether the court below erred in holding that 42 U.S.C. § 1985(3) provides a remedy for injuries suffered by Plaintiffs in an episode of mob violence resulting from a private conspiracy motivated by an ideological and geographical animus against nonunion workers.

2. Whether the court below erred in holding that animus against persons because of their nonunion associations and beliefs and "outsider" status may constitute "class-based invidiously discriminatory animus" for the purposes of 42 U.S.C. § 1985(3) as interpreted in *Griffin v. Breckenridge*, 403 U.S. 88 (1971).

3. Whether the court below erred in holding that the employer of workers who were the victims of conspiratorial violence may recover for his own injuries suffered as a result of that violence.

DESIGNATION OF CORPORATE RELATIONSHIPS

The A.A. Cross Construction Company, Inc., filing this Brief in Opposition to Petition for Certiorari as Respondent in this proceeding, states that:

1. This is its original designation of corporate relationships.

2. The A.A. Cross Construction Company, Inc. is not owned by any parent corporation.

3. The A.A. Cross Construction Company, Inc. does not have any ownership interest in any subsidiaries.

4. The A.A. Cross Construction Company, Inc. does not have any affiliates.

A.A. CROSS CONSTRUCTION
COMPANY, INC.
Dated: October 26, 1982

THE PARTIES

The Parties to this case are:

Paul E. Scott
James T. Matthews
A.A. Cross
A.A. Cross Construction Company, Inc.
Carpenters, Local 610
Carpenters, Local 753
Pipefitters, Local 195

All other parties to the original proceeding have been dismissed by the court below.

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NO. 82-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BILL MOORE, ET AL,
Defendants-Petitioners,

v.

PAUL E. SCOTT, ET AL,
Plaintiffs-Respondents.

Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

SUPPLEMENTARY STATEMENT OF THE CASE

This is an action brought under 42 U.S.C. § 1985(3) by two construction workers and their employer for in-

junctive relief and damages against certain unions and some of their leaders. The complaint alleged that Defendants conspired to deprive Plaintiffs of the equal protection of the laws and equal privileges and immunities under the laws, and pursuant to this conspiracy, executed an attack on Plaintiffs causing them injury.

The following additional statement of background facts from the majority opinion more fully indicates the nature of the conspiracy found by the court below:

> Cross Construction Company's hiring practices provoked an antipathetic response from some segments of the Port Arthur community. In fact, on several occasions prior to the eruption of violence on January 17, popular enmity had risen to the level of warnings and threats directed against Cross and its employees. Local residents had confronted Cross employees at a local tavern and pool hall frequented by them, threatening to place pickets at the construction site, promising to make Cross "go union," and occasionally warning of trouble if Cross did not cease hiring nonunion laborers. About three months before the January 17 attack, one of the individual defendants, Bill Moore, approached Mr. Cross and threatened that he would "hurt you bad," saying, "What is going to happen when that big rig of yours down there burns up?" On another occasion, John Wallace, financial secretary and business representative for the Carpenters Local #610, had told Cross that "this is union country" and that if he persisted in using nonunion labor it was "going to cost you a million dollars."
>
> Meanwhile, during the months preceding the January 17 violence, rumors began to develop concerning a "citizens protest" to be staged at the Alligator

> Bayou construction site. These rumors contemplated a public demonstration to call attention to the fact that Cross hired nonunion labor and did not have a labor contract with any union as well as to protest the company's policy of hiring employees from outside the Port Arthur community.
>
> . . . .
>
> On the morning of January 17, after most of the Cross employees had arrived at work, a crowd of nearly three hundred people assembled at the main access road leading to the Cross construction site. . . . The crowd began to get unruly, pushing and shoving the remaining Cross workers as they arrived. Nevertheless, Cross's employees began work as usual. Then, shortly after 7:00 that morning, a group of four pickup trucks, each carrying between twelve and eighteen persons, emerged from the crowd gathered at the access road and drove onto the jobsite. Plaintiff Scott went out to meet the intruders and to request them to leave the area, but one of them approached Scott and said, "Man, you all have got to be crazy . . . this is a union town." Scott told his interlocutor that they did not want any trouble, and he attempted to gather together the other employees and to leave the jobsite. However, before he could complete his mission, someone stepped out of the group and struck him on the head. Suddenly, the mob swarmed over the construction site, brutally beating Cross and his employees with iron rods and wooden boards, overturning and setting fire to the trailer that served as the construction site office, smashing automobile and truck windshields, and vandalizing company tools and equipment.

Scott v. Moore, 680 F.2d 979, 983-84 (5th Cir. 1982); App. A-5

The district court issued temporary and permanent injunctions against further violence and awarded damages to the Plaintiffs. On appeal, both a panel of the court of appeals and, the entire court, on rehearing *en banc*, affirmed the district court judgment with respect to those Defendants who seek this writ of certiorari. (App. E-1).

SUMMARY OF THE ARGUMENT

The decision of the court below is a correct and straightforward application of 42 U.S.C. § 1985(3) and of this Court's decision in *Griffin v. Breckenridge*, 403 U.S. 88 (1971). To the extent that the decision below is inconsistent with *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972), *Dowling* is inconsistent with *Griffin*. In any case, the Fifth Circuit's reasoning is consistent with the law in virtually all circuits, including some opinions from the Seventh Circuit. There is no conflict among the circuits with respect to the definition and application of the class-based animus requirement, nor is the Fifth Circuit's opinion in conflict with *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366 (1979). In addition, the Fifth Circuit's resolution of the standing question is dictated by the resolution of this issue in *Griffin* and *Novotny*.

Petitioners have not shown any special or recurring importance to this case or the issues raised therein. The issues raised revolve around the determination of factual matters. *Pullman-Standard v. Swint*, 102 S.Ct. 1781 (1982). Further, a decision by this Court is unnecessary for the guidance of litigants.

REASONS FOR DENYING THE WRIT

I. The Decision Below Correctly Applied 42 U.S.C. §1985(3) to the Facts of This Case And Creates No Conflict Among the Circuits Requiring Resolution By This Court.

A. The Decision Below is a Correct and Straightforward Application of § 1985(3).

Petitioners (Defendants) seek review of the decision below on the basis of alleged conflicts with decisions of other circuits. The Court of Appeals for the Fifth Circuit affirmed the district court, holding that Respondents (Plaintiffs) had established a cause of action under 42 U.S.C. § 1985(3) by proof that Defendants had conspired together for the purpose of depriving persons of the equal protection of the laws and had acted on the basis of that conspiracy, injuring Plaintiffs in their person and property. The finding that the conspiracy was aimed at a denial of equal protection of the laws was supported by the subsidiary factual determination that Petitioners' conspiracy was motivated by a class-based animus against persons having certain beliefs, status and associations. The Fifth Circuit's decision is therefore a straightforward application of the statute as interpreted by this Court in *Griffin v. Breckenridge*, 403 U.S. 88 (1971) to the facts of this case. It presents no issue meriting this Court's review.

In *Griffin* the Court held that 42 U.S.C. § 1985(3) is applicable to purely private conspiracies. *Collins v. Hardyman*, 341 U.S. 651 (1951), which had read an "under color of law" requirement into § 1985(3), making it a virtual dead letter, was to that extent overruled. The Court saw "[l]ittle reason . . . not to accord to the words

of the statute their apparent meaning," and "the words of the statute fully encompass the conduct of private persons." *Griffin*, 403 U.S. at 96. The Court noted that it is easy to be misled by the similarity between the limiting language of § 1985(3), making it applicable only to conspiracies for the purpose of depriving persons of " 'the equal protection of the laws, or of equal privileges and immunities under the laws' "—and the language of the first section of the fourteenth amendment, "which in terms speaks only to the States":

> A century of Fourteenth Amendment adjudication has, in other words, made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons. Yet there is nothing inherent in the phrase that requires the action working the deprivation to come from the State. Indeed, the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in § 1985(3) of *all* deprivations of "equal protection of the laws" and "equal privileges and immunities under the laws," whatever their source.

Id. at 97 (citation omitted) (emphasis in original).

Merely because § 1985(3) applies to private conspiracies does not mean, the Court made clear in *Griffin*, that the statute is a "general federal tort law." 403 U.S. at 102. The legislative history of the statute, particularly the addition of the limiting language by an amendment to the original bill, made it clear that Congress intended to reach only conspiratorial action resulting from "the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment." *Id.* Therefore,

the Court concluded that a § 1985(3) cause of action lies only where there is "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* (footnote omitted).

Tracking the words of the statute, the Court stated the elements of a § 1985(3) cause of action as follows:

> To come within the legislation a complaint must allege that the defendants did (1) "conspire or go in disguise on the highway or on the premises of another" (2) "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." It must then assert that one or more of the conspirators (3) did, or caused to be done, "any act in furtherance of the object of [the] conspiracy," whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States."

403 U.S. at 102-03.

The Court found the complaint in *Griffin* sufficient in that it alleged a conspiracy, acts in furtherance thereof, resulting injuries to plaintiffs, and the "requisite animus" showing a purpose to deny equal rights. The animus requirement was supported by allegations that the object of the conspiracy was to deprive plaintiffs of the equal enjoyment of legal rights, including "rights such as free speech, assembly, association, and movement," because of their race. 403 U.S. at 103.

Finally, the Court made clear that the statutory question of the scope of § 1985(3) is distinct from the question of the constitutionality of its application in a par-

ticular case. The statute need not be constitutional in all its possible applications in order to be constitutional in those applications as to which a sufficient source of congressional authority exists. In *Griffin*, finding sufficient congressional authority on the basis of § 2 of the thirteenth amendment and the constitutionally protected right of interstate travel, the Court expressly left open the question of other sources of authority, including § 5 of the fourteenth amendment.

Following *Griffin's* analysis of the elements of a § 1985(3) cause of action, the court below found that Plaintiffs had proved a conspiracy, acts in furtherance thereof, and resulting injuries. As to the second element, the denial of equal rights, the court found that the purpose of the conspiracy was to deny the employee Plaintiffs their protected rights of association and that the requisite class-based animus had been shown. The "conspiracy in this case was motivated by a prounion animus so strong," the court found, "that it staked its claim not merely ideologically, but geographically." 680 F.2d at 992.

The court found in the legislative history of the "Ku Klux Klan Act," the progenitor of § 1985(3), a particular congressional concern for persons discriminated against because of their political associations or beliefs or because of regional hostility. *Id.* at 994. Because "animus directed against nonunion association is closely akin to animus directed against political association," (*ibid.*) and the "nonunion Plaintiffs were repeatedly told that they were in union country and would be punished for choosing to work there nonunion" (*id.* at 992), Plaintiffs were within the intended coverage of

§ 1985(3) on both grounds: "[T]he position of these nonunion employees in Jefferson County, Texas is markedly similar to that of Republicans in the [post-Civil War] South." *Id.* at 994. The court therefore concluded that the nonunion employees in this case are "the kind of persons Congress intended the Ku Klux Klan Act to protect." *Ibid.* Finally, the court found that the application of § 1985(3) to this case is constitutional pursuant to the power of Congress under the Commerce Clause (*id.* at 997), a finding Petitioners do not question (Pet. 15, n.8).

B. There is No Clear and Substantial Conflict Among the Circuit Courts on the Issue of State Action.

Petitioners seek this Court's review of the decision below solely on the ground of asserted conflicts between that decision and decisions of other circuits. Petitioners' principal contention is that the decision below conflicts with the decision of the Seventh Circuit in *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972), holding, in Petitioners' words, that "Where a § 1985(3) plaintiff claims interference with a right that has its source in the fourteenth amendment there must be a state involvement of some kind because the fourteenth amendment (unlike the thirteenth amendment and the constitutional right to travel) protects only against state action." Pet. 9-10. *Dowling*, Petitioners assert, represents "not only the majority view but is also entirely sound." Pet. 11. The court below rejected *Dowling's* reinsertion of a state action requirement into § 1985(3), in effect a return to *Collins v. Hardyman*, on the ground that *Dowling*

is plainly inconsistent with "the Supreme Court's express reasoning in *Griffin*." 680 F.2d at 989.[1]

The court below noted that *Griffin* "even considered and rejected the very explanation of section 1985(3)" adopted in *Dowling*. *Id.* at 990. Addressing the argument that private conspirators could only deprive a person of equal protection by interfering with state authorities, *Griffin* noted that § 1985(3) itself contains another clause dealing explicitly with interference with state officials.[2] It is "almost impossible to believe," this Court said, "that Congress intended, in the dissimilar language of the portion of § 1985(3) now before us, simply to duplicate the coverage" of other provisions of the same act. 403 U.S. at 99. If *Griffin* were to be confined to its facts and limited to cases involving violations of thirteenth amendment rights or the right of interstate travel—the effect Petitioners ascribe to *Dowling*—the great pains taken by the Court to ensure that § 1985(3) not become a general federal tort law would have been entirely unnecessary. The *Griffin* Court limited the application of the statute to conspiracies motivated by a "class-based invidiously discriminatory animus" precisely because no limiting state action requirement was perceived to exist. *Dowling* also

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1. The principal dissent below, relied on by Petitioners, also appears to reject the *Dowling* view, arguing that § 1985(3) provides "a remedy for private conduct designed to deny a citizen equal protection of the laws because of his membership in a class that is protected by the fourteenth amendment." 680 F.2d at 1019 n.63. The dissent disagrees, however, with the majority's finding that the employee plaintiffs here belong to such a class.

2. " 'If two or more persons . . . conspire . . . for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws. . . .' " *Griffin*, 403 U.S. at 99 n.7 (citation omitted).

seems contrary to *Griffin* in failing to distinguish the question of the scope of § 1985(3) from the question of its constitutionality in particular applications.

Petitioners are clearly mistaken in their assertion that *Dowling* represents the majority view from which the decision below is a deviation. To the contrary, the Seventh Circuit stands virtually alone in its extremely restrictive view of the meaning of § 1985(3), and even the Seventh Circuit has not been entirely consistent in this view. *Compare Cohen v. Illinois Institute of Technology*, 524 F.2d 818, 829-30 n.33 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) (§ 1985(3) action may not require state action where first amendment rights are involved) *with Murphy v. Mount Carmel High School*, 543 F.2d 1189 (7th Cir. 1976) (rejecting the *Cohen* view). *See also Dear v. Rathje*, 391 F. Supp. 1, 8 (N.D. Ill. 1975), *aff'd mem.*, 532 F.2d 756 (7th Cir. 1976) and *Franceschina v. Morgan*, 346 F. Supp. 833 (S.D. Ind. 1972) (conspiracies to violate fourteenth amendment rights actionable without state involvement).

Petitioners also erroneously state that the Fourth Circuit is in accord with *Dowling*. To the contrary is *Ward v. Connor*, 657 F.2d 45 (4th Cir. 1981), *cert. denied*, 102 S.Ct. 1253 (1982)—a recent decision cited by the court below but ignored by Petitioners—which distinguished the case relied on by Petitioners. The Fourth Circuit has now squarely adopted the majority view.

Decisions of other courts of appeals holding that § 1985 (3) is applicable in proper circumstances to private conspiracies interfering with rights or interests protected by the fourteenth amendment include the following: Second Circuit: *Weise v. Syracuse University*, 522 F.2d

397 (2d Cir. 1975). Third Circuit: *Richardson v. Miller*, 446 F.2d 1247 (3d Cir. 1971). Sixth Circuit: *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975), *cert. denied*, 423 U.S. 930 (1975); *Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973); *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973). Eighth Circuit: *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976); *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971). Ninth Circuit: *Lutcher v. Musician's Union Local 47*, 633 F.2d 880 (9th Cir. 1980); *Life Insurance Co. of North America v. Reichardt*, 591 F.2d 499 (9th Cir. 1979). Tenth Circuit: *Romero v. Union Pacific Railroad*, 615 F.2d 1303 (10th Cir. 1980); *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926 (1975). The Eleventh Circuit is of course bound by *Scott v. Moore* as an *en banc* opinion of the former Fifth Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).[3]

The decision of the court below represents the majority, as well as the correct, view on the state action issue. Petitioners have not shown a clear and substantial conflict on this issue requiring resolution by this Court.

C. The Circuit Courts Have Been Entirely Consistent in Their Identification of Class-Based Animus.

Petitioners also contend that the decision below conflicts with other court of appeals' decisions as to the criteria for "identifying protected and unprotected classes

3. *But see Rice v. New England College*, 676 F.2d 9 (1st Cir. 1982). In this case, the First Circuit apparently adopted, without discussion, the view espoused by the Seventh Circuit in *Dowling*.

for the purposes of § 1985(3)." Pet. 11.[4] No such conflict exists; all courts appear to agree with the court below that discrimination on the basis of beliefs or associations may constitute "class-based" animus for the purposes of § 1985(3). Far from being divergent (Pet. 11), the decisions consistently interpret the class-based discrimination requirement to mean that the class must share common characteristics or beliefs and that the conspiracy must have been directed against class members because of those characteristics or beliefs, not, *post hoc*, because the members are all victims of Defendants' conduct. *See, e.g.*, the cases cited by the court below, 680 F.2d at 992. *Browder v. Tipton*, 630 F.2d 1149 (6th Cir. 1980) and *Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743 (10th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981), relied on by Petitioners, are not to the contrary, but in fact state and apply the same criteria stated and applied by the court below.

Browder involved a claim by two employees of a freight line company who alleged that they were falsely arrested after crossing a picket line to make a delivery to Cities Service, the picketed company. Plaintiffs claimed to be members of a " 'class comprised of non-Cities Service personnel attempting to carry on business with Cities Service during the course of the strike.' " 630 F.2d at 1151. Having found that the defendants' actions were unrelated to the plaintiffs' beliefs and were only a response to plaintiffs' conduct in crossing the picket line, the Sixth Circuit held on the facts that plaintiffs were not the

4. It is doubtful whether this is even a coherent question under § 1985(3). The requirement for the existence of a "class" refers, not to the plaintiffs, but to the animus of defendants. Thus § 1985(3) does not protect *any* classes, but rather protects "any person" against animus of a certain kind.

victims of a class-based animus within the meaning of *Griffin*. This holding is, of course, in no way inconsistent with the decision of the Fifth Circuit in the present case. Indeed, the Sixth Circuit explicitly recognized that "racial, religious, political or sectional animus" would provide a basis for a § 1985(3) action. *Id.* at 1152. More specifically, "individuals who join together as a class for the purpose of asserting certain fundamental rights" are within the scope of § 1985(3) even though "picket line crossers who are falsely arrested" are not. *Id.* at 1150. The court cited with approval its many decisions upholding § 1985(3) actions involving class-based animus formed on the basis of political associations or beliefs. *Id.* at 1154.

Similarly, as the very language quoted by Petitioners shows (Pet. 12), *Silkwood* is fully in accord with the court below. The *Silkwood* court merely adhered to the uniformly accepted view that a § 1985(3) action requires a showing of "prejudice against a class *qua class*," a "general prejudice which transcends the immediate dispute. . . ." 637 F.2d at 748. The decisions relied on by Petitioners rest, not on any disagreement with the decision below, but on factual findings that class-based animus was not shown in those cases. The court below made the factual finding that class-based animus was shown. That finding, amply supported by evidence in the record, provides no basis for review of the decision by this Court.[5]

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5. Petitioners—and the principal dissent (680 F.2d at 1015)—incorrectly describe the class protected by the decision below as individuals who desire "to work only with the kind of persons they choose to work with." Pet. 9. Plaintiffs did not claim, and the majority below did not hold, that plaintiffs had a constitutionally enforceable right to choose those with whom they will work. The right recognized in the decision below was plaintiffs' right to be free from conspiratorial violence directed against them because of their nonunion status, beliefs, and associations. This right exists whether

Nor is there any basis for Petitioners' contention (Pet. 13) that the decision below conflicts with this Court's decision in *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366 (1979). In *Novotny*, the Court held that a § 1985(3) action cannot be brought to vindicate rights created and defined by Title VII of the Civil Rights Act of 1964 and thereby "avoid most if not all of [the] detailed and specific provisions of the law." 442 U.S. at 375-76. The present case does not involve an attempt to assert rights created by a federal statute while avoiding the limitations imposed by that statute. The court below referred to the National Labor Relations Act, not as the source of the rights being vindicated, but only to show that "congressional concern for those in plaintiffs' class makes their protection by section 1985(3) particularly appropriate." 680 F.2d at 995.

D. The Fifth Circuit's Resolution of the Standing Question is Dictated by *Griffin* and *Novotny*.

Finally, Petitioners seek review of the decision below on the ground of a conflict with *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711 (9th Cir. 1981), *cert. denied*, 454 U.S. 967 (1981), on a question of standing to sue. The correctness of the decision of the court below—that a person injured by a conspiracy motivated by class-based animus may sue under § 1985(3) even though not a member of the relevant class—would seem beyond dispute. It is supported not only by the

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plaintiffs are working with others holding similar beliefs, working with union members—in fact, some of Cross' employees were union members (680 F.2d at 983)—meeting in a hall, or walking on the street.

plain language of the statute, but also by this Court's decisions in *Griffin* and *Novotny*.[6]

The plaintiffs in *Griffin* were merely passengers in an automobile owned and operated by the target of the conspiracy, R. G. Grady, who was believed to be a civil rights worker. The Court held that plaintiffs were entitled to recover nonetheless, because "the petitioners—whether or not the nonparty Grady was the main or only target of the conspiracy—allege personal injury resulting from" the acts done in furtherance of the conspiracy. 403 U.S. at 103. Similarly, in *Novotny*, plaintiff was a male who claimed he was discharged from employment because he sought to advance the interests of female employees. Although the suit was based on discriminatory animus against females, the Court did not question plaintiff's standing to sue and presumably recognized that standing by deciding the case on grounds other than this threshold issue.[7]

On this matter, as on the others raised in the petition, Petitioners have not shown a basis for review of the decision below by this Court.

II. The Issues Presented Are Not of Fundamental and Recurring Legal Importance.

Petitioners are correct that 42 U.S.C. § 1985(3) presents important and difficult questions of scope and applicability (Pet. 15), but the basic questions were answered

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6. *Richardson v. Miller*, 446 F.2d 1247 (3d Cir. 1971), and *Novotny v. Great American Federal Savings & Loan Association*, 584 F.2d 1235 (3rd Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979), are in accord.

7. There would also appear to be no reason why an employer willing to hire nonunion employees should not be included in the class formed on the basis of nonunion status, associations and beliefs.

by this Court in *Griffin* and need not be reconsidered now. The decision below, as we have shown, merely applies § 1985(3) as interpreted in *Griffin* to the facts of this case, presenting no occasion for this Court's review. Only two additional observations are required.

First, Petitioners complain that the "class-based animus" requirement has led to "a series of seemingly *ad hoc* determinations." In short, Petitioners seek review of the determination that the requisite "class-based invidiously discriminatory animus" existed. Only last term, this Court decided that questions of discriminatory intent are pure questions of fact. *Pullman-Standard v. Swint,* 102 S.Ct. 1781 (1982). Although *Swint* was addressed to § 703(h) of the Civil Rights Act of 1964, its reasoning is equally applicable here. The Court's decision rested on two factors. As a general matter, " 'findings as to the design, motive and intent with which men act' [are] peculiarly factual issues for the trier of fact. . . ." *Id.* at 1790 (quoting *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949)). In addition, the statutory provision at issue in *Swint* required, like 42 U.S.C. § 1985(3), a finding of actual motive: "Discriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive." 102 S.Ct. at 1790-91. Since both § 703(h) and § 1985(3) revolve around "the intent with which men act" and require a finding of "actual motive," both are concerned with pure questions of fact.

Since "class-based animus" is a pure question of fact, it becomes clear that Petitioners are demanding review of the factual determinations in the court below in the guise of presenting a legal issue. Petitioners' attempt to displace the district court is evident from their argument,

which requires this Court to decide various questions of fact, such as whether the dispute involved in this case was private or whether it was a matter of general prejudice (Pet. 12-13) and whether or not there was a sufficient factual nexus with matters preempted by federal labor legislation. Clearly these and other matters affecting the existence and nature of the animus must be left to the finders of fact under the standard announced in *Swint*.

It is also clear that the "*ad hoc* determinations" of which Petitioners complain are entirely desirable and appropriate. As previously discussed, the circuit courts of appeals have consistently applied the same legal standards to the determination of class-based animus. However, since class-based animus is a factual matter, the ultimate resolution of the question will depend upon local conditions and the particular facts of each case.

The second and final point to be made with regard to the importance of this case relates to the necessity for a decision at this time. One of the primary functions served by a decision of this Court is to provide guidance to litigants. A decision by this Court ought to inform potential defendants whether contemplated conduct is lawful or not. Such considerations are patently absent from the present case. There is no question but that Petitioners' conduct was unlawful. It has been established as a matter of fact that the Petitioners committed acts of conspiracy, riot, assault, vandalism, and terror. Indeed, in the Fifth Circuit, a plaintiff must necessarily show that a defendant's conduct was independently unlawful in order to bring suit under § 1985(3). *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977). There is, therefore, no need of an authoritative opinion by this Court for the purpose of advising litigants that

their conduct is unlawful, since unlawful action is a precondition to bringing suit. To this extent, review by this Court would not serve a useful purpose.

CONCLUSION

The "conflict and confusion in the courts of appeals," as seen by Petitioners, is, as we have shown, largely a misperception. The decision below is in the mainstream of the law and correct on its facts. It is not a suitable vehicle for review of any pre-existing conflict by this Court.

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE —
CERTIFICATE BY BAR MEMBER

I, Robert Q. Keith, attorney of record for Paul E. Scott, James T. Matthews, A.A. Cross, and A.A. Cross Construction Company, Inc., Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ____ day of November, 1982, I served copies of the foregoing Brief in Opposition to Petition for Certiorari on Petitioners hereto, as follows: on the United Brotherhood of Carpenters and Joiners of America, Local 610 (AFL-CIO), United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 195 (AFL-CIO), and the United Brotherhood of Carpenters and Joiners of America, Local 753 (AFL-CIO), Petitioners, by mailing a copy in a duly addressed envelope, registered mail, return receipt requested, to their attorney of record as follows:

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No. 82-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 610 (AFL-CIO), *et al.*,
Petitioners,

v.

PAUL E. SCOTT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONERS' REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-486

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1. In the petition (at p. 9) we: argued that the "holding [in this case] that [42 U.S.C.] § 1985(3) is applicable although the objective of the conspiracy does not encompass governmental interference with the plaintiff's associational freedom is squarely contrary to Judge (now Justice) Stevens' reading of § 1985(3) in *Dombrowski v. Dowling*, 459 F.2d 190 (C.A. 7) (*'Dowling'*)"; noted that the court below had *acknowledged* a conflict between its reading of § 1985(3) and that of the Seventh and Fourth Circuits (Pet. 10); and added that on this question the Eighth Circuit is aligned with the Fifth Circuit and the First Circuit is aligned with the Seventh and Fourth Circuits (Pet. 10).

The brief in opposition (at p. 9) responds that "there is no clear and substantial conflict among the circuit courts on the issue of state action" (heading; first letter capitals omitted). After a discussion of why Respondents believe *Dowling* to be "plainly inconsistent" with *Griffin v. Breckenridge*, 403 U.S. 88 (Br. in Opp. 9-11; compare Pet. 1a-3a), the "no clear and substantial conflict" argument is developed in three paragraphs, none of which, as we now show, provide support for that argument.

In the first of these paragraphs Respondents state:

> Petitioners are clearly mistaken in their assertion that *Dowling* represents the majority view from which the decision below is a deviation. To the contrary, the Seventh Circuit stands virtually alone in its extremely restrictive view of the meaning of § 1985(3), and even the Seventh Circuit has not been entirely consistent in this view. *Compare Cohen v. Illinois Institute of Technology*, 524 F.2d 818, 829-30 n.33 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) (§ 1985(3) action may not require state action where first amendment rights are involved) *with Murphy v. Mount Carmel High School*, 543 F.2d 1189 (7th Cir. 1976) (rejecting the *Cohen* view). *See also Dear v. Rathje*, 391 F. Supp. 1, 8 (N.D. Ill. 1975), *aff'd mem.*, 532 F.2d 756 (7th Cir. 1976) and *Franceschina v. Morgan*, 346 F. Supp. 833 (S.D. Ind. 1972) (conspiracies to violate fourteenth amendment rights actionable without state involvement). [Br. in Opp. 11.]

But Judge Stevens' *Cohen* opinion is entirely *consistent* with his *Dowling* opinion: "[W]e remain convinced that our reasoning in *Dombrowski* [*v. Dowling*] is a correct explanation of why the statute does not broadly 'apply to all tortious, conspiratorial interferences with the rights of others.'" (*Cohen*, 524 F.2d at 829.) To be sure, that sentence is followed by a careful caveat: "We have not been faced with the question whether the *Dombrowski* [*v. Dowling*] rationale would apply to a right protected

by the First Amendment which in terms is only a protection against State action, but which is often accorded special deference." (*Cohen*, 524 F.2d at 829-830 n.33.) But, as even Respondents recognize, when the Seventh Circuit thereafter faced that open question in *Murphy v. Mount Carmel High School*, the answer was that the *Dowling* rule *does* apply to such Fourteenth Amendment claims. And not even Respondents contend that since the *Murphy* decision there has been any "inconsistency" in the Seventh Circuit decisions.

With regard to the Fourth Circuit law, Respondents recite:

> Petitioners also erroneously state that the Fourth Circuit is in accord with *Dowling*. To the contrary is *Ward v. Connor*, 657 F.2d 45 (4th Cir. 1981), *cert. denied*, 102 S.Ct. 1253 (1982)—a recent decision cited by the court below but ignored by Petitioners—which distinguished the case relied on by Petitioners. The Fourth Circuit has now squarely adopted the majority view. [Br. in Opp. 11.]

This is what the pertinent portion of the *Ward* opinion says:

> Having concluded that Ward's complaint satisfies the requisite elements of a § 1985(c) cause of action, it is, of course, necessary that we identify a source of congressional power to reach the alleged conspiracy. The *Griffin* Court found such power in § 2 of the Thirteenth Amendment as well as the right of interstate travel which the Court recognized was "among the rights and privileges of National citizenship." *Id.*, 403 U.S. at 106, 91 S. Ct. at 1800. Since Ward is not a member of the Negro race, congressional authority cannot be based on the Thirteenth Amendment. However, the complaint clearly charges that a purpose of the conspiracy was to prevent Ward from traveling from state to state and that the conspirators did, in fact, interfere with Ward's consti-

tutional right,[5] and this is sufficient to support his cause of action.

---

[5] Since we find congressional authority to reach the conspiracy under Ward's right of interstate travel, it is unnecessary for us to consider the troublesome question of congressional power under § 5 of the Fourteenth Amendment which confronted us in *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (4 Cir. 1974).

[657 F.2d at 48.]

Plainly *Ward's* holding is *not* "to the contrary" of *Dowling's* or of *Bellamy's*. (See Pet. 9-10, 2a.) Nor can the *Ward* Court's determination to decide that case on "right to travel" grounds or its fair characterization of the question presented here as "troublesome" possibly be taken to signify an overruling of *Bellamy*.

Finally, Respondents contend that eleven cited cases "hold[] that § 1985(3) is applicable in proper circumstances to private conspiracies interfering with rights or interests protected by the fourteenth amendment." (Br. in Opp. 11-12.) As the carefully guarded phrasing ("in proper circumstances") suggests, those cases do not on inspection support Respondent's "no clear and substantial conflict" thesis.

Five of the cited decisions are obviously beside the point: two are Eighth Circuit decisions, and we recognized in our petition that the Eighth Circuit's position is the same as the Fifth Circuit's;[1] two are cases in which *public officials* allegedly participated in the conspiracy;[2] and one involves an alleged conspiracy to secure *governmental interferences* with the plaintiff's Fourteenth Amendment rights.[3] Five others are reversals of judg-

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[1] *Means v. Wilson*, 522 F.2d 833 (C.A. 8), *cert. den.*, 424 U.S. 958; *Action v. Gannon*, 450 F.2d 1127 (C.A. 8) (en banc).

[2] *Glasson v. City of Louisville*, 518 F.2d 899 (C.A. 6), *cert. den.*, 423 U.S. 930; *Cameron v. Brock*, 473 F.2d 608 (C.A. 6).

[3] *Lutcher v. Musicians Union Local 47*, 633 F.2d 880, 885 (C.A. 9).

ments for defendants in which the district court had ruled that the plaintiffs were required to show government involvement in the alleged conspiracy and a resulting *remand* for further proceedings; none recognize much less address the point made in *Dowling*—that to come within § 1985(3) private conspiracies to deprive the plaintiffs of a Fourteenth Amendment right must be directed at securing government interference with that right.[4] We do not believe that these interlocutory rulings by their silence add to the substance of the dialogue between the Courts of Appeals on the soundness of the *Dowling* rationale. The facts of those cases do, however, indicate the variety of minor local disputes cognizable under state law that would, under the Fifth and Eighth Circuits' reading of § 1985(3), be transmuted into federal causes of action; this consequence supports our contention that the issue as to the scope of the federal courts § 1985(3) jurisdiction we raise is an important one. One of the eleven cited cases, *Life Ins. Co. of North America v. Reichardt*, 591 F.2d 499 (C.A. 9), does recognize the conflict between the Seventh and Eighth Circuits and apparently agrees with the *Dowling* analysis with regard to Fourteenth Amendment clams. (See 591 F.2d at 504.) But *Reichardt* holds that where a *state law* "prohibits the private discrimination alleged", the plaintiff "has a state right or entitlement to be free from the alleged private discrimination" and on that basis a derivative § 1985(3) claim. (*Id.* at 504-505.) That approach is different both from that of the Fifth and Eighth Circuits and from that of the Seventh, Fourth and First Circuits. *Reichardt* thus provides added support for our contention that in light of the circuit conflict we have outlined it is now timely for this Court to clarify the extent to which § 1985(3) covers private conspiracies.

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[4] *Weise v. Syracuse University*, 522 F.2d 397, 408 (C.A. 2); *Richardson v. Miller*, 446 F.2d 1247, 1249 (C.A. 3); *Marlowe v. Fisher Body*, 489 F.2d 1057, 1064-65 (C.A. 6); *Romero v. Union Pacific Railroad*, 615 F.2d 1303, 1312 (C.A. 10); *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 931 (C.A. 10).

2. So far as one can tell from its opinion, the majority below defined the class-based animus here as animus directed at "nonunion workers who are attacked for their choice to associate with other nonunion workers thereby enabling an employer to offer significant work to the class * * *." (Pet. App. A-18.) That choice is labeled one of "economic association" (*id.*), and the associational right thus defined in the Fifth Circuit evidently has nothing to do with whether the members of the class of "nonunion workers" are union members or not; for as Respondents note "some of Cross' employees [here] were union members" (Br. in Opp. 15, n.5 cont.). Respondents contend, contrary to our submission (Pet. 11-13), that the Fifth Circuit's approach to what constitutes class-based animus actionable under § 1985(3) just outlined is consistent with that of the Sixth and Tenth Circuits in that:

> [A]ll courts appear to agree with the court below that discrimination on the basis of beliefs or associations may constitute "class-based" animus for the purposes of § 1985(3). Far from being divergent (Pet. 11), the decisions consistently interpret the class-based discrimination requirement to mean that the class must share common characteristics or beliefs and that the conspiracy must have been directed against class members because of those characteristics or beliefs, not, *post hoc*, because the members are all victims of Defendants' conduct. *See, e.g.*, the cases cited by the court below, 680 F.2d at 992. *Browder v. Tipton*, 630 F.2d 1149 (6th Cir. 1980) and *Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743 (10th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981), relied on by Petitioners, are not to the contrary, but in fact state and apply the same criteria stated and applied by the court below. [Br. in Opp. 13.]

But Judge Merritt's opinion in *Browder* makes it plain that the Sixth Circuit did not, as Respondents would have it, "h[o]ld *on the facts* that plaintiffs were not the victims of a class-based animus within the meaning of *Griffin*"

(Br. in Opp. 13-14; emphasis added). Rather *Browder* held that class-based animus based on a form of economic association indistinguishable from that here (associating to do work that involves crossing a picket line) does not come within § 1985(3) at all:

> Thus, plaintiffs' class is simply one of picket line crossers. No matter how "invidious" any discrimination against this class may be, the right to cross a picket line is no more constitutionally protected than is the right to be an unpopular barn owner. [630 F.2d at 1154, quoted at Pet. 12 n.7.]

Nor can *Silkwood* be distinguished from the instant case on the facts. The Tenth Circuit there upheld the dismissal for failure to state a cause of action of a complaint alleging a conspiracy against the plaintiff to deprive her "and other employees who were engaged in organizing a labor union of the equal protection and enjoyment of the laws of the United States" (637 F.2d at 746 quoted at Pet. 12). Unless working under nonunion conditions enjoys a higher status than working under union conditions, the instant case and *Silkwood* cannot be reconciled.

? Respondents entire response to our showing of a conflict on § 1985(3) standing to sue between the decision below and *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711 (C.A. 9), *cert. denied*, 454 U.S. 967, is:

> The correctness of the decision of the court below—that a person injured by a conspiracy motivated by class-based animus may sue under § 1985(3) even though not a member of the relevant class—would seem beyond dispute. It is supported not only by the plain language of the statute, but also by this Court's decisions in *Griffin* and [*Great American Fed. S. & L. Assn. v.*] *Novotny*. [Br. in Opp. at 15-16.]

But the standing question was not raised or discussed in *Griffin* or in *Novotny* (442 U.S. 316). And neither the

Ninth Circuit in deciding *Caulis* nor this Court in denying the petition for certiorari there were of the view that *Griffin* and *Novotny* compel the result reached below. There is in short a real and substantial conflict in the circuits on the § 1985(3) standing question.

CONCLUSION

For the above-stated reasons, as well as those stated in the petition for a writ of certiorari, that petition should be granted.

Respectfully submitted,

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BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1) Whether 42 U.S.C. § 1985(3) protects against interference with rights that, in contrast to the right to travel (at issue in *Griffin* v. *Breckenridge*, 403 U.S. 88), are protected by the Constitution only against state action, where no state action is alleged or proved?

2) Whether individuals who desire to work with others under either union or nonunion conditions, and are for that reason prevented from doing so, comprise a class protected by § 1985(3)?

3) Whether individuals who are not members of a § 1985(3) protected class may nevertheless bring a § 1985 (3) suit for damages?*

---

* The parties to this case are
Paul E. Scott
James T. Matthews
A. A. Cross
A. A. Cross Construction Co., Inc.
Bill Moore
Robert Wayne Fault
Bruce Hill
Curtis Beasley
Jay Desormaux
Fish Ferguson
John Wallace, Jr.
Asbestos Workers, Local 22
Asbestos Workers, Local 112
Boilermakers, Local 587
Bricklayers, Local 13
Carpenters, Local 610
Carpenters, Local 753
Carpenters, Local 2007
Cement Masons, Local 884
Cement Masons, Local 804
Lathers, Local 416
Pipefitters, Local 2484
Engineers, Local 450
Painters, Local 328

Pipefitters, Local 1347
Pipefitters, Local 195
Plumbers, Local 504
Electrical Workers, Local 479
Ironworkers, Local 125
Laborers, Local 852
Roofers, Local 116
Sheet Metal Workers, Local 196
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Laborers, Local 870
Sabine Area Building Trades Council

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The *en banc* opinion of the court of appeals is reported at 680 F.2d 979 and is reproduced at pp. A-1 to A-55 of the separately bound appendix to the petition for a writ of certiorari herein. ("App."). The panel opinion of the court of appeals is reported at 640 F.2d 708 and is reproduced at App. B-1 to B-29. The opinion of the district court is reported at 461 F. Supp. 224 and is reproduced at App. C-1 to C-11.

JURISDICTION

The *en banc* decision and judgment of the court of appeals were issued on July 1, 1982. (App. A-1 to A-55 and E-1 to E-2.) The jurisdiction of the district court was invoked under 42 U.S.C. § 1985(3). The petition for a writ of certiorari was filed on September 20, 1982 and was granted on November 29, 1982. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves Rev. Stat. § 1980, 42 U.S.C. § 1985 (3), which provides in pertinent part:

> If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws * * * [and] in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a claim of the United States, the party so injured or deprived may have an action for the recovery of damages, occa-

sioned by such injury or deprivation, against any one or more of the conspirators.[1]

STATEMENT OF THE CASE

A. Factual Background.

For the purpose of the proceedings in this Court, we accept the following description of the parties and the background facts in the majority opinion below: [2]

> This case arises out of an episode of mob violence [at the Cross Construction Co.'s Alligator Bayou Pumping Station construction project near Port Arthur, Texas (during which company employees were injured and company equipment and other property was damaged)] that occurred in the early morning hours of January 17, 1975. The plaintiffs are A. A. Cross Construction Company, Inc., and two of its employees, Paul Scott and James Matthews. The defendants include the Sabine Area Building and Construction Trades Council, a loose confederation of craft and construction unions located in the Port Arthur, Texas, area. Also named as defendants are twenty-five of the Council's member unions and several individual members of some of these labor unions.
>
> • • • •
>
> A. A. Cross Construction Company is a Texas corporation engaged in the building and construction industry as a general contractor. In May, 1974, Cross contracted with the Department of the Army, United States Corps of Engineers to erect the Alligator Bayou Pumping Station and Gravity Drainage Structure on the hurricane levee along Taylor's Bayou near Port Arthur.
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> • • • •

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[1] 42 U.S.C. § 1985(3) is "the surviving version of § 2 of the Civil Rights Act of 1871." (*Great American Fed. S. & L. Assn. v. Novotny*, 442 U.S. 366, 368.) That provision is occasionally referred to as "§ 1985(c)." (See, *e.g.*, 442 U.S. at 368.)

[2] The omitted portion of that court's description pertains in large part to the identity of those responsible for the January 17, 1975 incident, an issue not before this Court.

> In accordance with its customary practice, the Cross Construction Company hired its workers for the Alligator Bayou project without regard to union affiliation, employing persons solely on the basis of its own need for the applicant's occupational skills. Cross did not have a collective bargaining agreement with any labor union, and when this incident occurred no union was seeking to organize the company's employees. In addition, Cross often hired workers from outside the Port Arthur community.
>
> * * * *
>
> * * * The entire [January 17] episode lasted only a few minutes, but the destruction was devastating. Cross and his employees were treated for their [resulting] injuries at a local hospital, and work at the construction site did not resume for nearly three weeks. Some of Cross's employees, frightened by the possibility of repeated attacks at the jobsite, refused to return to work. In addition, the violence and vandalism delayed the completion of the project by about six months, ultimately causing the Cross Construction Company to default in its contractual obligation to the U.S. Army Corps of Engineers. [App. A-4 to A-6.]

B. Proceedings in the District Court.

On January 31, 1975, plaintiffs Scott and Matthews initiated this lawsuit against the individual defendants. The plaintiffs sought and obtained a temporary injunction against violent, intimidating, or destructive acts against employees at the Alligator Bayou Pumping Station project. Nearly two years later, the plaintiffs amended their complaint, adding A. A. Cross Construction Company, Inc., as a plaintiff and the Sabine Area Building and Construction Trades Council and twenty-five local unions as defendants.

After trial, the district court found that the plaintiffs had proved that the defendants conspired to deprive plaintiffs of the equal protection of the laws in violation of 42 U.S.C. § 1985(3). That court made the preliminary in-

junction permanent against all the defendants except one of the local unions. The district court also assessed damages against eleven of the local unions: the individual plaintiffs were each awarded $5,000.00; plaintiff Cross Construction Company was awarded $112,385.14. (App. D-1 to D-5.)

C. Proceedings in the Court of Appeals.

The defendants appealed. All the union defendants objected to the injunction as inconsistent with the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.* The defendants against whom damages had been awarded appealed on the grounds that the plaintiffs had not established a cause of action under 42 U.S.C. § 1985(3), and that the responsibility of the individual organizations had not properly been established under § 6 of the Norris-LaGuardia Act's "clear proof" standard of agency or even under the common law's standard of agency.

A panel of the court of appeals affirmed the district court's construction of 42 U.S.C. § 1985(3) and the judgment against three of the union defendants (the present petitioners) while reversing the damages judgment against all the other union defendants because the evidence on agency was deemed insufficient to establish their responsibility. (App. B-25 to B-28.)

The court of appeals then agreed to rehear the case *en banc*, and on rehearing affirmed the panel's conclusions in all respects by a 14-10 vote. In an opinion by Judge Charles Clark (the author of the panel decision), that court concluded, insofar as is presently pertinent:

> Congress intended 42 U.S.C. § 1985(3) to provide a remedy for private conspiracies directed at nonracial classes. Specifically, we determine that the statute encompasses a conspiracy designed to deprive nonunion workers of the First Amendment right to freely associate with one another where that conspiracy does not occur in conjunction with legitimate union activity and is perfected by force and violence. [App. A-29 to A-30.]

Judge Clark concluded that the district court's findings "that the [present petitioners] authorized or participated in this conspiracy were not clearly erroneous," and affirmed the judgment against petitioners. (App. A-30.)[3]

Three dissenting opinions were filed. Judges Rubin and Williams authored an opinion (sometimes hereafter referred to as "the principal dissent") for eight members of the court below concluding, *inter alia*, that 42 U.S.C. § 1985(3) does not grant a cause of action to the plaintiffs here. (App. A-36 to A-49.) Judge Garwood filed a separate dissenting opinion concluding that the plaintiffs had not stated a cause of action under 42 U.S.C. § 1985(3). (App. A-50 to A-55.) Judge Anderson dissented without reaching the § 1985(3) issues. (App. A-50.)

SUMMARY OF ARGUMENT

In part I we describe in detail the legislative history of § 2 of the Civil Rights Act of 1871, now 42 U.S.C. § 1985(3). That description reconfirms the conclusion in *Griffin* v. *Breckenridge*, 403 U.S. 88, 101 that § 1985(3) "cover[s] private conspiracies" but not "all tortious conspiratorial interferences with the rights of others." We then draw two indisputable lessons, each of which requires rejection of the majority below's theory that § 1985(3) provides a remedy for the plaintiffs here:

a) The dominant concern of the moderate Republicans who sought and secured a limiting amendment to § 2 of the 1871 Act was to assure that Congress, in providing a cause of action against tortious conspiracies, did not exceed the scope of the Federal Government's authority stated in the Reconstruction Amendments to the Constitution as those Republicans' understood those Amendments. The focus was on the potential application of § 2 to deprivations of rights stated in the Fourteenth Amend-

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[3] The majority below held that responsibility was to be determined under the common law standard rather than under § 6 of the Norris-LaGuardia Act. The other defendant unions were absolved of responsibility even under the common law standard. (App. A-30.)

ment. As Rep. Garfield made plain, that Amendment's limitation on the power of the State governments applies up to the point but no further than the point at which "the laws are just and equal on their face, yet, by [the State's] systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them." (Globe App. 153.) Thus, with respect to Fourteenth Amendment rights (which plaintiffs herein assert), the sum and substance of the compromise struck and enacted into law as § 2 of the 1871 Act, is clearly and accurately stated by Justice Stevens' concurring opinion in *Great American Fed. S. & L. Assn.* v. *Novotny*, 442 U.S. 368, 384-385:

> If * * * private persons engage in purely private acts of discrimination * * * they do not violate the Equal Protection Clause of the Fourteenth Amendment. The rights secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment are rights to protection against unequal or unfair treatment by the State, not by private parties. Thus, while § 1985(c) does not require that a defendant act under color of state law, there still can be no claim for relief based on a violation of the Fourteenth Amendment if there has been no involvement by the State. The requirement of state action, in this context, is no more than a requirement that there be a constitutional violation. [Footnote omitted.]

(b) Although the precise nature of the discriminatory animus sufficient to bring a conspiracy within § 1985(3) is inherently elusive, this much is plain: even the broadest statement of the proviso's scope by a proponent, Sen. Edmunds (quoted *infra* p. 34), shows that the provision does not reach this case. As Judge Merritt wrote in reflecting on Sen. Edmunds' remarks:

> Defendants here, given their motive, would have thwarted due process for all those—and only those —who crossed [a] picket line. Crossing a picket line is not a special exercise of the right to a probable cause arrest in the same sense—to use another of

> [Sen.] Edmunds' examples—that being a Democrat is a discrete and particular exercise of the First Amendment. Thus, plaintiffs' class is simply one of picket line crossers. No matter how "invidious" any discrimination against this class may be, the right to cross a picket line is no more constitutionally protected than is the right to be an unpopular barn owner. [*Browder* v. *Tipton*, 630 F.2d 1149, 1154 (C.A. 6)]

In part II we show that, contrary to the admonition of *Griffin*, the majority below has transmuted § 1985(3) into a "general federal tort law" (403 U.S. at 102). We show first that the court below erred in rejecting Justice Stevens' view in *Novotny*. The majority below missed the critical distinction drawn by him in *Dombrowski* v. *Dowling*, 459 F.2d 190, 193 (C.A. 7), "between the interests of the plaintiff that the statute was enacted to protect and the conduct of the conduct of the defendants which it proscribes." We show next that the majority below also misconstrued the precedents in this Court by ruling that "merely working for a nonunion employer [does] qualify for constitutional protection" (App. A-12). *Smith* v. *Arkansas State Highway Employees*, 441 U.S. 463, held that the First Amendment right to associate does not encompass the right to bargain collectively; the existence or nonexistence of that right is left to legislative action. It follows that the right *not* to associate cannot encompass a right *not* to bargain collectively. We then show by quoting from the principal dissent below that the individual plaintiffs are not members of a "class" at all (App. A-43, A-44), and even if they are, this "class is one newly defined by this case, not one having any previous discernible jurisprudential identity," (App. A-46). It is concededly a closer question whether, *if* the individual plaintiffs have stated a claim, their employer is also entitled to relief under § 1985(3). We submit that the better view is that he is not, because the 42nd Congress did not intend to provide a remedy to persons outside the limited class protected in the compromise which was enacted as § 2 of the 1871 Act.

ARGUMENT

I. 42 U.S.C. § 1985(3) Does Not Reach This Case

1. *The Prior Case Law*

The questions presented here as to the reach of 42 U.S.C. § 1985(3) (quoted *supra* pp. 2-3) are, we believe, best understood against the background provided by this Court's recent decisions construing that provision—*Griffin* v. *Breckenridge*, 403 U.S. 88 and *Great American Fed. S.&L. Assn.* v. *Novotny*, 442 U.S. 366.

(a) In *Griffin* the Court overruled *Collins* v. *Hardyman*, 341 U.S. 651, "which in effect construed the * * * language of § 1985(3) as reaching only conspiracies under color of state law" (403 U.S. at 92) and held that it is "evident that all indicators—text, companion provisions, and legislative history—point unwaveringly to § 1985(3)'s coverage of private conspiracies," (*id* at 101). Recognizing, too, that "the enormous sweep of the original language [of § 1985(3)] led to pressures for [limiting] amendment" (*id.* at 100), which pressures were successful (see *id.* at 99-101), the *Griffin* Court added the following *caveat*:

> *That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others.* For, though the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of Representative Cook, "that Congress has a right to punish an assault and battery when committed by two or more persons within a State." * * * The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. See the remarks of Representatives Willard and Shellabarger,

quoted *supra*, at 100. The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.[9] The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

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[9] We need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3) before us. Cf. Cong. Globe, 42d Cong., 1st Sess., 567 (1871) (remarks of Sen. Edmunds).

[403 U.S. at 101-102; first emphasis added; other footnote omitted.]

These guidelines for determining the type of private conspiracies subject to redress under § 1985(3) were sufficient for the decision in *Griffin* for two reasons. The first concerned the nature of the *Griffin* complaint which

> fully alleges, with particulars, that the respondents conspired to carry out the assault. It further asserts that "[t]heir purpose was to prevent [the] plaintiffs and other Negro-Americans, through . . . force, violence and intimidation, from seeking the equal protection of the laws and from enjoying the equal rights, privileges and immunities of citizens under the laws of the United States and the State of Mississippi," including a long list of enumerated rights such as free speech, assembly, association, and movement. The complaint further alleges that the respondents were "acting under a mistaken belief that R. G. Grady was a worker for Civil Rights for Negroes." [403 U.S. at 103.]

The Court concluded that "the conduct here alleged lies so close to the core of the coverage intended by Congress that it is hard to conceive of wholly private conduct that would come within the statute if this does not." (*Id.* at 104.) Second, given the nature of those allegations, it

was plain that the holding that § 1985(3) applied created no constitutional difficulties:

> "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." * * * We can only conclude that Congress was wholly within its powers under § 2 of the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men.
>
> * * * *
>
> Our cases have firmly established that the right of interstate travel is constitutionally protected, does not necessarily rest on the Fourteenth Amendment, and is assertable against private as well as governmental interference. * * * The "right to pass freely from State to State" has been explicitly recognized as "among the rights and privileges of National citizenship." * * * That right, like other rights of national citizenship, is within the power of Congress to protect by appropriate legislation. [403 U.S. at 105-106; citations omitted.]

(b) In *Novotny*, the Court reviewed a Third Circuit ruling

> that conspiracies motivated by an invidious animus against women fall within § 1985(c), and that Novotny, a male allegedly injured as a result of such a conspiracy, had standing to bring suit under that statutory provision. It ruled that Title VII could be the source of a right asserted in an action under § 1985(c), and that intracorporate conspiracies come within the intendment of the section. Finally, the court concluded that its construction of § 1985(c) did not present any serious constitutional problem. [442 U.S. at 370.]

In reversing that ruling this Court reasoned:

> Section 1985(c) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates. * * *
>
> Under Title VII, cases of alleged employment discrimination are subject to a detailed administrative and judicial process designed to provide an opportunity for nonjudicial and nonadversary resolution of claims. * * *
>
> * * * *
>
> If a violation of Title VII could be asserted through § 1985(c), a complainant could avoid most if not all of these details and specific provisions of the law. * * *
>
> * * * *
>
> Section 1985(c) * * * *creates* no rights. It is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right—to equal protection of the laws or equal privileges and immunities under the laws—is breached by a conspiracy in the manner defined by the section. * * * The right Novotny claims under § 704(a) did not even arguably exist before the passage of Title VII. * * *
>
> * * * *
>
> Unimpaired effectiveness can be given to the plan put together by Congress in Title VII only by holding that deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985(c). [442 U.S. at 372-378 omitting discussion of the detailed provisions of Title VII; emphasis in original.]

(c) The district court made it plain that the instant case "does not involve an allegation of racial discrimination, nor an interference with the right to travel interstate." (App. C-4). Rather the courts below found that the private action here was motivated by an "animus directed at nonunion workers who are attacked for their choice to associate with other nonunion workers thereby enabling an employer to offer significant work to th[at] class [of workers] * * *." (App. A-18.) That "choice to

associate" was labeled by the majority below as one of "economic * * * association * * * closely akin to political association." (*Id.*)

Thus, this case is remote from the area held by *Griffin* to be covered by § 1985(3)—the area of private action motivated by "racial discriminatory animus" (403 U.S. at 102) the Thirteenth Amendment specifically grants Congress the power to redress. And if one accepts, arguendo, the novel view of the majority below that there is an associational right stated in the Constitution to work in the private sector under an industrial relations system of one's choice, this case is not governed by *Novotny*.

It is therefore appropriate to begin with a fuller description of § 1985(3)'s legislative history than was necessary in *Griffin* or in *Novotny*. In so doing—as the Court noted in undertaking a like task with regard to one of § 1985 (3)'s companion pieces (§ 1983)—"[a]s in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve." (*Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 608.)

2. *The Background of the Civil Rights Act of 1871*

Section 1985(3) is, as we have seen, the lineal descendent of § 2 of the Civil Rights Act of 1871, 17 Stat. 13. This Court has many times reviewed the genesis and the legislative evolution of that Act and we draw on those opinions to put § 2 into its context.

District of Columbia v. *Carter*, 409 U.S. 418, describes the impetus to legislative action:

> After the Civil War ended in 1865, race relations in the South became increasingly turbulent. The Ku Klux Klan was organized by southern whites in 1866, and a wave of murders and assaults was launched against both blacks and Union sympathizers. Thus, at the opening of the 42d Congress, considerable apprehension was expressed by Republicans about the

> insecurity of life and property in the South, and on March 23, 1871, President Grant sent a message to Congress requesting additional federal legislation to curb this rising tide of violence. Such legislation was deemed essential in light of the inability of the state governments to control the situation. Five days later, Congressman Shellabarger of Ohio introduced the bill that eventually was to become the Ku Klux Klan Act of 1871. [409 U.S. at 425-426; footnotes omitted.]

Monell v. *New York City Dept. of Social Services*, 436 U.S. 658, 665-669, in turn, outlines the "three distinct stages in the legislative consideration" of the bill so introduced:

> On March 28, 1871, Representative Shellabarger, acting for a House select committee, reported H.R. 320, a bill "to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes." H.R. 320 contained four sections. Section 1, now codified as 42 U.S.C. § 1983, was the subject of only limited debate and was passed without amendment. Sections 2 through 4 dealt primarily with the "other purpose" of suppressing Ku Klux Klan violence in the Southern States.[11] The wisdom and constitutionality of these sections—not § 1, now § 1983—were the subject of almost all congressional debate and each of these sections was amended. The House finished its initial debates on H.R. 320 on April [6], 1871, and one week later the Senate also voted out a bill.

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[11] Briefly, § 2 created certain federal crimes in addition to those defined in § 2 of the 1866 Civil Rights Act, 14 Stat. 27, each aimed primarily at the Ku Klux Klan. Section 3 provided that the President could send the militia into any State wracked with Klan violence. Finally, § 4 provided for suspension of the writ of habeas corpus in enumerated circumstances, again primarily whose thought to obtain where Klan violence was rampant. See Cong. Globe, 42d Cong., 1st Sess., App. 335-336 (1871) (hereinafter Globe App.).

* * * *

> The House [on April 15, 1871] refused to acquiesce in a number of amendments made by the Senate * * * and the respective version of H.R. 320 were therefore sent to a conference committee. Section 1 of the bill, however, was not a subject of this conference since, as noted, it was passed verbatim as introduced in both Houses of Congress.
>
> On April 18, 1871, the first conference committee completed its work on H.R. 320. * * *
>
> * * * *
>
> The first conference substitute passed the Senate [on April 18] but was rejected by the House [on April 19]. * * *
>
> Because the House rejected the first conference report a second conference was called and [on April 19] issued its report [which was accepted. The resulting legislation was signed into law on April 20, 1871.] [Footnotes omitted]

It remains only to make two additional introductory points. Section 2 of the 1871 Act, which was subject to only minor technical amendments in the Senate, like § 1, was accepted by the House as passed by the Senate prior to the first conference. Thus, the critical debate on § 2 occurred during the first stage of the 1871 Act's legislative evolution. Second, as *Monroe* v. *Pape*, 365 U.S. 167, states and as *Griffin* and *Monell* confirm: "As introduced § 2 was very broad * * * It was this provision that raised the greatest storm. It was § 2 that was rewritten * * *." (365 U.S. at 180-181.)

That "rewriting," as we now show, was done in the House of Representatives in the days between March 28, 1871 when the bill was introduced and April 6 when the bill as amended passed the House. Given the sheer mass of the materials we proceed: (1) by setting out the description of the original § 2 by Rep. Shellabarger and noting the comments of the other supporters of that version of the bill; (2) by setting out the objections to the original § 2 stated by the "moderate" Republicans—who

held the balance of power—as stated by then Rep. (later President) Garfield in his speech of April 4, 1871 and noting the comments of others of that group; (3) by setting out the explanation of the amended § 2 proposed on April 5, 1871—and adopted by the House without change and eventually enacted with only minor technical Senate changes—by Rep. Shellabarger and by the moderate Republicans who had opposed the original § 2 and who changed their position by reason of the amendment; and (4) by canvassing in shorter compass the Senate debate since, as stated by Sen. Edmunds, the Chairman of the Senate Judiciary Committee, the Senate "did not intend to go beyond the scope of the House bill."

3. *The Evolution of, and the Legislative Debates on, § 2 of the Civil Rights Act of 1871*

(a) Rep. Shellabarger reported H.R. 320 on behalf of the select committee to which President Grant's message had been referred. (Cong. Globe, 42d Cong., 1st Sess., 317 (1871) (hereafter "Globe").) Section 2 of that bill provided:

> Sec. 2. That if two or more persons shall, within the limits of any State, band, conspire, or combine together to do any act in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States, which, committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, or larceny; and if one or more of the parties to said conspiracy or combination shall do any act to effect the object thereof, all the parties to or engaged in said conspiracy or combination, whether principals or accessories, shall be deemed guilty of a felony, * * *. [Globe App. 68-69]

Rep. Shellabarger described the purpose of this section as follows:

> The whole design and scope of the second section of this bill was to do this: to provide for the punishment of any combination or conspiracy to deprive a citizen of the United States of such rights and immunities as he has by virtue of the laws of the United States and of the Constitution thereof. [Globe 382]

In debate with Rep. Farnsworth, who thought the bill went too far in providing federal punishment for criminal activity, Rep. Shellabarger insisted that, "the gist of the offense in the second section is in the conspiracy to defeat United States law made in protection of the fundamental rights of national citizenship, * * *." (Globe App. 113-114.)

Rep. Shellabarger contended that Congressional authority to legislate directly with respect to the actions of individuals was provided by §§ 1 & 5 of the Fourteenth Amendment. He noted first that § 1 directed that certain persons are citizens of the United States and from this concluded that "The making of them United States citizens and authorizing Congress by appropriate law to protect that citizenship gave Congress power to legislate directly for enforcement of such rights as are fundamental elements of citizenship." (Globe App. 69.) Next, he observed that these fundamental rights, encompassed in the term "privileges and immunities," included especially the right to "protection by Government." (Globe App. 69; see *Monell*, 436 U.S. at 670 (discussing Rep. Shellabarger's point).)

Following his discussion of § 2 of H.R. 320, Rep. Shellabarger turned to § 3, which defined denial of equal protection as a failure or refusal of the state to give protection from violence or unlawful combinations that so obstruct the execution of the laws as to deprive a "portion or class of the people" of rights named in the bill. His argument in support of this section is of special

interest because it clearly states his understanding of the privileges and immunities and the equal protection clauses of the Fourteenth Amendment and their interaction:

> I now again go back to the first section of the fourteenth article. That section provides two things which I wish to notice. The first provision is that—
>
> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."
>
> This provision requires that the laws on their face shall not "abridge" the privilege or immunities of citizens. It secures equality toward all citizens on the face of the law. It provides that those rights shall not be "abridged;" in other words, that one man shall not have more rights upon the face of the laws than another man. By that provision equality of legislation, so far as it affects the rights of citizenship, is secured. But the section does not stop there. It contains two other provisions, only one of which I need now notice. It provides:
>
> "Nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."
>
> The laws must be, first, equal, in not abridging rights; and second, the States shall equally protect, under equal laws, all persons in them. Therefore, under the provisions of the fourteenth amendment, when these clauses are put in juxtaposition, in order to bring the idea together, Congress shall have power to make and enforce all proper legislation which shall be necessary to require of the States that they shall not abridge the rights of citizenship, and also that they shall protect all persons equally. Nothing can be plainer. The thing is so absolutely self-evident that it admits of no enforcement by argument. *Two things are provided—equal laws and protection for all; and whenever a State denies that protection Con-*

gress may by law enforce protection. [Globe App. 71; emphasis added]

Although some members of the House took a more sweeping view of federal authority (*e.g.*, Globe App. 83-85 (Rep. Bingham)), most of the supporters of H.R. 320 as introduced followed the sense of Rep. Shellabarger's opening remarks and argued that the source of federal authority lay in the *de facto* denial of equal protection resulting from the failure of the Southern States to enforce the law against the Klan. (*E.g.*, Globe App. 72-73 (Rep. Blair), 78-80 (Rep. Perry), Globe 322 (Rep. Stroughton), 368 (Rep. Sheldon), 375 (Rep. Lowe), 428-429 (Rep. Beatty), 448 (Rep. Butler), 459 (Rep. Coburn); *see* Flack, *The Adoption of the Fourteenth Amendment* 228 (1908); Harris, *The Quest for Equality* 45-46 (1960).) Typical are the views expressed by Rep. Hoar:

> But I may be asked, how do you distinguish the right to interfere in a case like this from the right to interfere in any case where there may be an imperfection in the administration of justice or incomplete security for human rights? Sir, criminals escape punishment in Massachusetts, in Vermont. A railroad company does not stand a fair chance for an impartial verdict before a Wisconsin jury. Is Congress to interfere? My answer to that is this: that *it is not possible to draw an absolute logical line between these two cases. The difference is a difference of degree. To authorize the interference of Congress there must be, not merely those imperfections and failures in the administration of law which are attendant upon all civil governments alike, but there must be a clear case of denial of government.* We cannot interfere to deal with the incidental evils which attend upon republican government; but we should interfere where, we being the judges whether the case exists or not, on our oaths responsible to the great tribunal of the American people, wherever these evils have attained such a degree as amounts to the destruction, to the overthrow, to the denial to large

classes of the people of the blessings of republican government altogether.

Another error, as it seems to me, Mr. Speaker, is to suppose that Congress in the exercise of this great power must either let the State alone altogether, or take entire possession of all its powers and instrumentalities of government, and displace the State government. But there is nothing in the Constitution that for a moment favors that idea. *We have a right to limit our interference to the extent of the evil.* If a particular class of persons are denied their civil rights permanently and as a rule in any State, we have a right to interfere simply to protect those rights, leaving the republican government, so far as it is enforced in regard to others, untouched where we can. [Globe 334; emphasis added]

Following a discussion of privileges and immunities, which consisted almost entirely of a lengthy quotation from *Corfield* v. *Coryell*, 4 Wash.Cir.Ct. Rep. 380, 6 Fed. Cas. 546 (No. 3,230) (C.C.Pa. 1823), Rep. Hoar turned to the equal protection clause:

Now, sir, what does the Constitution mean when it authorizes Congress to interfere by "appropriate legislation" in the case of the denial by a State to any person within its jurisdiction of the protection of the laws? If it had been the purpose of the American people, in accepting this article, to provide merely for the case of an affirmative formal exercise of power by the State in derogation of civil rights, that last clause would have been unnecessary, because the preceding part had provided that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." But the provision goes on to say that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

Now, *it is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration*

permanently and as a rule refuse to extend that protection. [Globe 334; emphasis added]

(b) Strong objections were raised by several Republican Congressmen who thought the original draft of § 2 of H.R. 320 went too far in legislating on matters within the exclusive province of the states. (Globe App. 112 (Rep. Moore), 113-117 (Rep. Farnsworth), 150-153 (Rep. Garfield), 188 (Rep. Willard), 313-315 (Rep. Burchard), Globe 485-486 (Rep. Cook), 514 (Rep. Poland).) The clearest and most influential statement of this "moderate" position was given by Rep. (later President) Garfield, on April 4, 1871, in what has been called, "[t]he most significant speech of the debate." (Harris, *Quest for Equality* 47; *see* Flack, *Adoption of the Fourteenth Amendment* 238-240.)

Rep. Garfield began his speech by stating the general principle that informs the entire succeeding discussion:

> No more beautiful thought was embodied in the structure of our Republic than this: that our fathers did so distribute the powers of government that no one power should be able to swallow, absorb, or destroy the others. In this distribution, it is provided that many, indeed most of the functions of government, shall be exercised immediately under the eyes of the people themselves. [Globe App. 149]

As a matter of constitutional authority then

> I presume it will not be denied, that before the adoption of the last three amendments it was the settled interpretation of the Constitution that the protection of the life and property of private citizens within the States belonged to the State governments exclusively.
>
> • • • •
>
> Now, three amendments, the thirteenth, fourteenth, and fifteenth, have been added to the Constitution, and it will not be denied that each of these amendemnts has so modified the Constitution as to change the relation of Congress to the citizens of the States. They have to some extent enlarged the

> functions of Congress, and, within prescribed limits, have extended its jurisdiction within the States. [Globe App. 150]

The rest of the speech concentrated on the Fourteenth Amendment.

Rep. Garfield emphasized that careful analysis of the Fourteenth Amendment's relation to the pending bill was warranted for two reasons—not only was that Amendment the stated constitutional basis for the bill but the debates would undoubtedly be taken as informative of the Amendment's meaning:

> I now come to consider last in order, for it is the basis of the pending bill, the fourteenth amendment. I ask the attention of the House to the first section of that amendment, as to its scope and meaning. I hope gentlemen will bear in mind that this debate, in which so many have taken part, will become historical, as the earliest legislative construction given to this clause of the amendment. Not only the words which we put into the law, but what shall be said here in the way of defining and interpreting the meaning of the clause, may go far to settle its interpretation and its value to the country hereafter. [Globe App. 150]

Before discussing the Amendment itself, Rep. Garfield recalled that as originally proposed the Fourteenth Amendment would have allowed Congress to legislate directly to protect the life, liberty and property of citizens of the United States, but that the first proposal had been rejected precisely because of this breadth of application:

> Now, let it be remembered that the proposed amendment was a plain, unambiguous proposition to empower Congress to legislate directly upon the citizens of all the States in regard to their rights of life, liberty, and property. Mark the action of the House. After a debate of two weeks, the record of which covers more than one hundred and fifty columns of the Globe, and in which the proposed amendment was subjected to a most searching ex-

> amination, it became evident that many leading Republicans of this House would not consent to so radical a change in the Constitution, and the bill was recommitted to the joint select committee. [Globe App. 151]

Rep. Garfield concluded this portion of his speech by comparing the Fourteenth Amendment as adopted with the rejected proposal:

> The one exerts its force directly upon the States, laying restrictions and limitations upon their power and enabling Congress to enforce these limitations. The other, the rejected proposition, would have brought the power of Congress to bear directly upon the citizens, and contained a clear grant of power to Congress to legislate directly for the protection of life, liberty, and property within the States. The first limited but did not oust the jurisdiction of the State over these subjects. The second gave Congress plenary power to cover the whole subject with its jurisdiction, and, as it seems to me, to the exclusion of the State authorities. [Globe App. 151]

Rep. Garfield then turned to a clause by clause examination of the first section of the Fourteenth Amendment, explaining,

> Mr. Speaker, I now inquire to what extent this section does enlarge the powers of Congress. On the proper answer to this inquiry will chiefly rest our power of legislation on the subject before us. [Globe App. 151]

He first discussed the citizenship clause and rejected Rep. Shellabarger's argument that this provided authority for § 2 of H.R. 320:

> I do not by any means underrate the value and importance of the first sentence of the amendment. It set at rest forever a vexed and troublesome question. • • • •
>
> But neither the civil rights bill nor the first sentence of the fourteenth amendment added to the

rights already guaranteed to the white citizen by the Constitution.

If the view I have taken of citizenship be correct, it follows that my colleague is in error when he attempts to find in the first sentence of this first section, the power to protect by congressional enactment, all the fundamental rights of persons and property within the States—a power which had theretofore, without question, belonged exclusively to the State governments. If my colleague's reasoning on this point be valid, I do not see how he can stop short of ousting completely the jurisdiction of the States over these subjects. He makes the clause go to the full extent of the one which was rejected. [Globe App. 152]

Next, Rep. Garfield dismissed the possibility that the privileges and immunities clause authorized federal protection of life, liberty and property:

[Rep. Hoar] quotes from Judge Washington's opinion in the case of Corfield *vs.* Coryell a statement that the fundamental rights of citizenship "are protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety."

Now, sir, if this is to be the construction of the clause, the conclusion is irresistible that Congress may assert and maintain original jurisdiction over all questions affecting the rights of the person and property of all private citizens within a State, and the State government may legislate upon this subject only by sufferance of Congress. It must be remembered that Judge Washington was interpreting the second section of the fourth article of the Constitution, and that neither he in 1820, nor any other judge before or since, has authorized so broad a construction of the power of Congress as that proposed by the gentlemen to whom I refer. [Globe App. 152]

Rep. Garfield then briefly discussed the due process clause, explaining that "it is a direct restraint upon the

governments of the States," similar to the fifth amendment's restraint upon the federal government. (Globe App. 153.) Finally, he examined the equal protection clause in a passage we quote in full:

> Mr. Speaker, I come now to consider the last clause of this first section, which is, as I believe, the chief and most valuable addition made to the Constitution in the section. That clause declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This thought was never before in the Constitution, either in form or in substance. It was neither expressed in any words in the instrument, nor could it be implied from any provision. *It is a broad and comprehensive limitation on the power of the State governments, and, without doubt, Congress is empowered to enforce this limitation by any appropriate legislation.* Taken in connection with the other clauses of this section, it restrains the States from making or enforcing laws which are not on their face and in their provisions of equal application to all the citizens of the State. It is not required that the laws of a State shall be perfect. They may be unwise, injudicious, even unjust; but they must be equal in their provisions like the air of heaven, covering all and resting upon all with equal weight. *The laws must not only be equal on their face, but they must be so administered that equal protection under them shall not be denied to any class of citizens, either by the courts or the executive.*
>
> It may be pushing the meaning of the words beyond their natural limits, but I think the provision that the States shall not "deny the equal protection of the laws" implies that they shall afford equal protection. [Globe App. 153; emphasis added]

Before turning to the proposed legislation, Rep. Garfield summarized his analysis of the Reconstruction Amendments:

> Now, Mr. Speaker, to review briefly the ground traveled over: the changes wrought in the Constitu-

tion by the last three amendments in regard to the individual rights of citizens are these: that no person within the United States shall be made a slave; that no citizen shall be denied the right of suffrage because of his color or because he was once a slave; that no State, by its legislation or the enforcement thereof, shall abridge the privileges or immunities of citizens of the United States; that no State shall, without due process of law, disturb the life, liberty, or property of any person within its jurisdiction; and finally, that no State shall deny to any person within its jurisdiction the equal protection of the laws . [Globe App. 153]

Rep. Garfield then concluded by discussing the proposed legislation in light of his constitutional analysis. After agreeing that § 1, which reached conduct under color of state law, was entirely unobjectionable, he said,

> But *the chief complaint, is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them.* Whenever such a state of facts is clearly made out, I believe the last clause of the first section empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection.
>
> *Now, if the second section of the pending bill can be so amended that it shall clearly define this offense, as I have described it, and shall employ no terms which assert the power of Congress to take jurisdiction of the subject until such denial be clearly made, and shall not in any way assume the original jurisdiction of the rights of private persons and of property within the States—with these conditions clearly expressed in the section, I shall give it my hearty support.* These limitations will not impair the efficiency of the section, but will remove the serious objections that are entertained by many gentlemen to the section as it now stands. [Globe App. 153; emphasis added]

And, thereafter, Rep. Garfield briefly remarked on § 3 of H.R. 320 in a passage that further illuminates his views:

> Now, Mr. Speaker, I call the attention of the House to the third section of the bill. I am not clear as to the intention of the commitee, but if I understand the language correctly, this section proposes to punish citizens of the United States for violating State laws. If this be the meaning of the provision, then whenever any person violates a State law the United States may assume jurisdiction of his offense. This would virtually abolish the administration of justice under State law. In so far as this section punishes persons who under color of any State law shall deny or refuse to others the equal protection of the laws I give it my cheerful support; but *when we provide by congressional enactment to punish a mere violation of a State law, we pass the line of constitutional authority.* [Globe App. 154]

In the face of unified Democratic opposition to H.R. 320, the moderate Republicans held the balance of power. (Harris, *Quest for Equality* 47.) Moreover, there was an essential concurrence between the views of the moderate Republicans and those who supported § 2 of the bill as originally drafted. The radical Republicans' central concern was the suppression of Klan violence and the moderate Republicans fully agreed that this was a proper objective. Thus, Rep. Hawley, who supported the original draft of § 2, could say with assurance, "I believe it can easily be so modified as to meet the views of every man upon this floor who has any disposition to aid the Government of the United States in protecting the peace of this country." (Globe 382.) To the same effect Rep. Garfield could conclude his call for amending § 2 by saying,

> Amendments have been prepared which will remove the difficulties to which I have alluded; and I trust that my colleague [Mr. Shellabarger] and his com-

mittee will themselves accept and offer these amendments. [Globe App. 153]

(c) And, in fact, on the day after Rep. Garfield's speech, the moderate Republicans' objections were met in a comprehensive amendment offered by Rep. Shellabarger to §§ 2-4 of the bill. Section 2 was expanded by a list of offenses addressed for the most part to attempts to overthrow or interfere by force with the processes of the United States government. In so far as it is relevant to the present discussion, the amended § 2 made it a crime for,

> [T]wo or more persons within any State or Territory of the United States [to] * * * conspire together for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, * * *. [Globe 477]

Rep. Shellabarger noted that it was this provision of the amended § 2 that "relate[d] to the disputed grounds." (Globe 478). The amended § 2 also created a civil action to redress damage done by acts in furtherance of any of the proscribed conspiracies. This addition went without explanation or comment in the House, although Sen. Edmunds mentioned that addition in introducing H.R. 320 to the Senate. (Globe 568.)

Rep. Shellabarger explained that the substitute § 2 had been drafted by Rep. Cook, and that its purpose was,

> to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy the equality of rights as contrasted with his

and other citizens' rights, shall be within the scope of the remedies of this section. [Globe 478] [4]

Rep. Cook, whom Rep. Shellabarger credited with drafting the "equal protection" amendment to § 2 of H.R. 320, defended the new proposal against Democratic charges:

> I think it is within the power of Congress to protect and enforce every right secured to American citizens by the Constitution of the United States. *I do not believe, and I do not know of any man who does believe, in the language of the gentlemen who last addressed the House, that Congress has a right to punish an assault and battery when committed by two or more persons within a State. I know of no one who believes that Congress has any right to enforce the laws of a State except in the emergency contemplated in the Constitution, when the State may be unable to do so by reason of lawless combinations too strong for the State authorities to suppress.* The statement that this bill aims at any such end is an utter misstatement of its object and effect. The proposition we maintain is that whenever the Constitution of the United States secures a right to a citizen Congress may enforce and protect that right. One absolute test is this: Congress may legislate to protect any right the denial of which by a State court would give the citizen affected thereby a right to appeal to the Supreme Court of the United States for redress. [Globe 485, emphasis added] [5]

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[4] Rep. Shellabarger explained also that § 3 had been amended to extend its coverage to obstruction of the laws of the United States and to add a proviso allowing the President to use state militia, and that § 4 had been amended to drop the authorization of martial law and to allow suspension of habeas corpus only when violence becomes so extreme as to be in defiance of not only state authority but also federal authority. (Globe 478.)

[5] Rep. Cook clarified his views on this point in a dialogue with Rep. Eldridge, a Democrat from Wisconsin:

> Mr. ELDRIDGE. Suppose two men should conspire to commit an assault and battery on a person, or to take away any

On the following day, other Republicans who had opposed the original § 2 spoke in favor of the amendment. Rep. Willard, who claimed to have drafted the amendment to that section, prefaced his remarks with a strong declaration of states' rights in the area of protecting persons and property:

> I have been educated to believe that there was a clear and well defined line between the powers of the General Government and the powers of the States; that what the General Government might do was plainly set forth in the Constitution, and that outside of that the people and the States had all power; and I hold to that belief today. And in no respect has this boundary line been clearer than upon the subjects concerning which we are now proposing to legislate. On this point there has hitherto been but one opinion, and that has been held and acted upon and declared by every department of the Government. The internal affairs of a State, its police regulations, and all laws for the protection of society or the person and property of individuals against lawless violence, are matters of State concern, and entirely outside of any powers conferred upon the General Government. Certain specified crimes, as treason and counterfeiting and offenses against the laws of the United States, the General Government has jurisdiction of and can punish; but it can no more punish offenses against life and property, as such, than it can regulate the distribution of the property of estates, the enforcement of civil contracts, the matters of taxation, or the proceedings in courts, in the States. *The individual, for all purposes except for the purpose of carrying into effect the Constitution of the United States and the laws made in pursuance thereof, looks to the State government for protection, and can have*

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of his rights of property or of liberty, can the United States redress that wrong?

Mr. COOK. Only in case the emergency has arisen, contemplated in the Constitution, in which the aid of the national Government may be invoked in aid of State laws. [Globe 485]

it nowhere else; and in the minds of those who framed the Constitution probably no belief was firmer than that for all time it was much safer to leave the States to protect the rights of the people than to place that duty upon the General Government. I believe that in this they were especially wise; but whether wise or not, I have no doubt that they had that opinion and made the Constitution to conform to it. [Globe App. 187; emphasis added]

Rep. Willard then explained the amendment to § 2:

> [T]he essence of the crime should consist in the intent to deprive a person of the equal protection of the laws and of equal privileges and immunities under the laws; in other words, that the Constitution secured, and was only intended to secure, equality of rights and immunities, and that we could only punish by United States laws a denial of that equality. The committee having now adopted and recommended this description of the offense instead of the one originally recommended by them, * * * I cheerfully give it my support. [Globe App. 188]

Rep. Burchard stated his objections to the scope of the original bill and announced his support of the amended version based on the following understanding of the Constitution and of the effect of the amendment "proposed by the committee":

> That amendment obviates in a great measure the objections and the doubtful construction as to the extent of jurisdiction for the punishment of crimes intended by the bill. It is not denial of protection, but of equality of protection, which constitutes the offense against the United States. *The conspiracies it seeks to punish are those designed to prevent the equal and impartial administration of justice.* These are essentially different from combinations and conspiracies to resist the execution of ordinary process. They must be aimed to prevent the enjoyment of equal civil rights. *The gravamen of the offense is the unlawful attempt to prevent a State through its officers enforcing in behalf of a citizen of the United*

States his constitutional right to equality of protection. It is this view that this legislation is competent. The civil rights and enforcement bills heretofore passed provided for the punishment of those acting as State officers who attempted to execute the laws of a State in conflict with the Constitution of the United States. Is not an individual acting as a State officer, upon whom, as such officer, the Constitution and laws of the United States impose the performance of those duties, also amenable to the laws of the United States for their non-performance? If the refusal of a State officer, acting for the State, to accord equality of civil rights renders him amenable to punishment for the offense under United States law, conspirators who attempt to prevent such officers from performing such duty are also clearly liable. [Globe App. 315; emphasis added] [6]

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[6] Rep. Poland, too, expressed his opposition to the original bill and his support for the amended version as meeting constitutional standards:

> [T]he last clause of the fourteenth amendment provides that no State shall deny the equal protection of the laws to its citizens. Now, in my judgment, that is a constitutional enactment that each State shall afford to its citizens the equal protection of the laws. *I cannot agree with several gentlemen upon my side of the House who insist that if the State authorities fail to punish crime committed in the State therefore the United States may step in and by a law of Congress provide for punishing that offense;* I do not agree with those gentlemen.
>
> *But I do agree that if a State shall deny the equal protection of the laws, or if a State make proper laws and have proper officers to enforce those laws, and somebody undertakes to step in and clog justice by preventing the State authorities from carrying out this constitutional provision, then I do claim that we have the right to make such interference an offense against the United States;* that the Constitution does empower us to aid in carrying out this injunction, which, by the Constitution, we have laid upon the States, that they shall afford the equal protection of the laws to all their citizens. [Globe 514; emphasis added]

On April 6, 1871, Rep. Shellabarger closed the House debate with a description of the conspiracy at which the bill was aimed:

> Stated in another way, the dual allegation is that the South and ruling half of the Democratic party is now engaged in the business of *overthrowing the political rights of the freed race and of all constitutions and laws securing them*, and that the overthrow is satisfactorily progressing under the cover of the night and the mask, and of perjury, by means of scourgings, burnings, and butcheries, e[illegible]djusted, with infernal skill, in the scales of their [illegible]nitude, to the attainment of the end aimed at. * * [W]hat] do these conspirators mean? I answer, they mean the overthrow of the equality, under the Constitution and its laws, of the enfranchised race. * * * [T]hese banded conspirators have the political aims I attribute to them, to wit, to "trample into dust" these newly-acquired political rights of the freedmen and the constitutions and laws which confer them * * *. [Globe 516-517; emphasis added]

With that speech, the House concluded its initial debates on H.R. 320. An amendment offered by Rep. Monroe adding the words "or go in disguise upon the public highway, or upon the premises of another" (Globe 515), and other minor amendments were accepted, and the bill passed the House by a vote of 118 to 91. All of the moderate Republicans who had voiced oppisition to the original proposal voted for the bill as amended. (Globe 522.)[7]

(d) After the House acted the initial Senate debate on H.R. 320 was quite brief. The Senate took up considera-

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[7] While the House had been debating H.R. 320, the Senate had been discussing similar issues in debating a resolution by Sen. Sherman to direct the Judiciary Committee to bring out a similar bill. Before H.R. 320 reached the Senate, several Republican Senators had expressed an understanding of the Fourteenth Amendment similar to that of the moderate Republicans in the House. (See

tion of the bill on April 11, 1871 and voted the bill out as amended on April 14.

Sen. Edmunds reported the bill for the Senate Judiciary Committee. Much of his opening speech was taken up with explaining the amendments suggested by that Committee to the House bill. He began by stating:

> The committee did not undertake to exercise any matter of taste in making these amendments, and *did not intend to go beyond the scope of the House bill.* All that it undertook to do was to do those things that it thought essential to make the bill, within its present constitutional scope and within the scope of its expediency also, so perfect that it would stand the test of a criminal inquiry in the courts of justice, and to embrace within its reach some of the objects which seem to have been accidentally omitted in the preparation of it in the House of Representatives. [Globe 567; emphasis added]

The Senate Committee left § 1 of the bill unchanged but several minor technical changes to § 2 were made. First, the Senate version provided redress for officers of the United States injured "while engaged" in carrying out official duties rather than, as the House bill provided, "on account" of carrying out official duties. Sen. Edmunds explained that it may be too difficult to prove that harm was done "on account" of the official's actions. (Globe 567.) Protection for those involved in proceedings before United States courts was extended to "any party" as well as to "any witness," as the House had provided. (Globe 567.)

Harris, *Quest for Equality* 49-50; Flack, *Adoption of the Fourteenth Amendment* 245-247.) Sen. Frelinghuysen, for example, insisted that, "The Federal Government should only interfere to protect the citizen of the United States in his privileges when the State clearly and persistently fails to do so." (Globe 501-502; *accord* 506 (Sen. Pratt), Globe App. 251 (Sen. Morton).

The last amendment to § 2 discussed by Sen Edmunds was one m.king it a crime to conspire for the purpose of obstructing the due course of justice in any state or territory with intent to deny any citizen the due and equal protection of the laws. (Globe 567.) Sen. Morton asked whether this was intended to apply to proceedings in the state courts, and Sen. Edmunds replied:

> Certainly, referring to "the equal and impartial course of justice" mentioned in the second section on the third page. This obstruction of the equal and impartial course of justice, however, must, under the provisions of all this bill, go so far as to deny and withhold from citizens of the United States that equality of protection in seeking justice which the Constitution of the United States gives to them. We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter, (which is a pretty painful instance that I have in my mind in the State of Florida within a few days where a man lost his life for that reason,) then this section could reach it. [Globe 567]

The Senate Judiciary Committee proposed even less extensive amendments to §§ 3 & 4 of the bill. Sen. Edmunds discussed these briefly and provided a short statement of his understanding of the bill, explaining with respect to § 2:

> The second section, it will be observed, only provides for the punishment of a conspiracy. It does not provide for the punishment of any act done in pursuance of the conspiracy, but only a conspiracy to deprive citizens of the United States, in the various ways named, of the rights which the Constitution

> and the laws of the United States made pursuant to it give to them; that is to say, conspiracies to overthrow the Government, conspiracies to impede the course of justice, conspiracies to deprive people of the equal protection of the laws, whatever those laws may be. It does not provide, as I say, for any punishment for any act which these conspirators shall do in furtherance of the conspiracy. It punishes the conspiracy alone, leaving the States, if they see fit, to punish the acts and crimes which may be committed in pursuance of the conspiracy. I confess that I thought myself it was desirable, to make the bill complete, to make it completely logical and completely effective, that a section should have been added providing not only for punishing the conspiracy, but providing also in the same way for punishing any act done in pursuance of the conspiracy. This section gives a civil action to anybody who shall be injured by the conspiracy, but does not punish an act done as a crime. [Globe 568]

Sen. Pool (the Republican from North Carolina who had authored the sixth section of the Enforcement Act of 1870, the source of Rep. Shellabarger's original draft of § 2 (Globe App. 68)), in an analysis that paralleled Rep. Garfield's, found support for H.R. 320, as amended, in the equal protection clause of the Fourteenth Amendment:

> The protection of the laws can hardly be denied except by failure to execute them. While the laws are executed their protection is necessarily afforded. * * *
>
> By the first section of the fourteenth amendment, a new right, so far as it depends on express constitutional provision, is conferred upon every citizen; it is the right to the protection of the laws * * *. Where any State, by commission or omission, denies this right to the protection of the laws, Congress may by appropriate legislation, enforce and maintain it. [Globe 608]

On April 14, 1871, Sen. Edmunds offered a noncontroversial amendment to § 2, punishing interference with

federal elections (Globe 704), and in concluding the Senate debate summed up the reasons for the legislation:

> The disorders in the South are not like the disorders in many other States, where there always are disorders, the results of private malice. The slaying of men there, as a rule, is not because the murderer and the assassin have any hostility or quarrel with the person who is the victim; but it is one step in the progress of a systematic plan and an ulterior purpose, and that is not to leave in any of those States a brave white man who dares to be a Republican or a colored man who dares to be a Republican or a colored man who dares to be a voter. The one is to be expelled or slain and the other is to be reduced to what they consider to be his normal condition. And while it is possible that there are many people in those States, as I have no doubt there are, who are pained at the severity and cruelty of these political methods, they, notwithstanding, do encourage and tacitly consent to them by their inaction. [Globe 702] [8]

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[8] Throughout the debate, the theme was repeated that the particular targets of the Klan conspiracy were the emancipated black citizens and their white allies in the Republican Party. (*E.g.*, Globe App. 101-107 (Sen. Pool) and Globe 251 (Sen. Morton) 412 (Rep. E. H. Roberts), 504-505 (Sen. Pratt). Rep. Perry expressed the views of the Republicans in Congress in particularly trenchant terms:

> *The most intelligent and probable explanation of motives imputes to them a rancorous and implacable discontent on account of the political and civil rights conferred on colored people by the constitutional amendments.* Their operations are, therefore, directed chiefly against blacks and against white people who by any means attract attention as earnest friends of the blacks.
>
> The aim appears to be to put them under fear, so that they will be silent when freemen should be at the polls; or, failing in that, to compel them to abandon citizenship in that part of the country; or, failing in that, to murder and mutilate them, disperse their families, burn their houses, and steal or destroy their property. In carrying out these purposes, neither mercy

At the end of the debate on the second conference report on H.R. 320, Representative Garfield expressed satisfaction with the bill in its final form:

> I believe, Mr. Speaker, that we have at last secured a bill, trenchant in its provisions, that reaches down into the very heart of the Ku Klux Klan organization, and yet is to guarded as to preserve intact the autonomy of the States, the machinery of the State governments, and the municipal organizations established under State laws. [Globe 808.]

4. *The Lessons of the Legislative Materials*

The *Griffin* Court stated that the legislative materials "point unwaveringly" to the conclusion that § 1985(3) "cover[s] private conspiracies" but not "all tortious conspiratorial interferences with the rights of others." (403 U.S. at 101.) The foregoing recitation of those materials confirms that conclusion. (*See, e.g.*, Rep. Cook (*supra* p. 28); Rep. Willard (*supra* pp. 29-30); Sen. Edmunds (*supra* p. 34).) And, that recitation points—sometimes unwaveringly and sometimes with less certainty—to three further conclusions as to the scope of § 1985(3), each of which requires rejection of the plaintiffs' claim in this case.

(a) The dominant concern of the moderate Republicans who sought and secured a limiting amendment to § 2 of the 1871 Act was to assure that Congress, in providing a cause of action against tortious conspiracies, did not exceed the scope of the Federal Government's authority stated in the Reconstruction Amendments to the Constitution as those Republicans understood those Amend-

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nor decency is observed. If their main inspiration is hostility to the rights given to the colored people under the thirteenth, fourteenth, and fifteenth amendments, it would extend to all who should befriend them; it would extend to the Republican party, to whom the blacks owe emancipation, and to whom alone they can look for sympathy and protection. [Globe App. 78; emphasis added]

ments. The moderate Republicans' concern focused on the potential application of § 2 of the 1871 Act to deprivations of rights stated in the Fourteenth Amendment. As Rep. Garfield made plain, those legislators viewed the Fourteenth Amendment as a "broad and comprehensive *limitation on the power of the State government* * * *." That limitation, he added, applies "even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them." And the condition Rep. Garfield stated for the moderate Republicans' support of § 2 of the 1871 Act was that the provision be amended to

> clearly define this offense, as I have described it, and shall employ no terms which assert the power of Congress to take jurisdiction of the subject until such denial be clearly made, and shall not in any way assume the original jurisdiction of the rights of private persons and of property within the States * * *. [Globe App. 153]

It appears, moreover, from Rep. Garfield's speech that the moderate Republicans had already drafted an amendment meeting those specifications and from Rep. Shellabarger's speech the next day that the moderate Republicans' amendment, as they wrote that amendment, was accepted by the proponents of the original § 2 (and thereafter by the House and, with minor technical amendments, by the Senate). As Rep. Burchard said: The gravamen of the offense is the unlawful attempt to prevent a State through its officers enforcing in behalf of a citizen of the United States his constitutional right to equality of protection." (Globe App. 315.)

The sum and substance of the compromise struck and enacted into law with regard to conspiracies that interfere with rights protected by the Fourteenth Amendment, then, is clearly and accurately stated by Justice Stevens concurring opinion in *Novotny*:

> The import of the language * * * as well as the relevant legislative history, suggests that the Congress which enacted [the original § 1985(3)] was concerned with providing federal remedies for deprivations of rights protected by the Constitution and, in particular, the newly ratified Fourteenth Amendment. * * *
>
> Some privileges and immunities of citizenship, such as the right to engage in interstate travel and the right to be free of the badges of slavery, are protected by the Constitution against interference by private action, as well as impairment of state action. * * *
>
> Other privileges and immunities of citizenship such as the right to due process of law and the right to the equal protection of the laws are protected by the Constitution only against state action. * * *
>
> If * * * private persons engage in purely private acts of discrimination * * * they do not violate the Equal Protection Clause of the Fourteenth Amendment. The rights secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment are rights to protection against unequal or unfair treatment by the State, not by private parties. Thus, while § 1985(c) does not require that a defendant act under color of state law, there still can be no claim for relief based on a violation of the Fourteenth Amendment if there has been no involvement by the State. The requirement of state action, in this context, is no more than a requirement that there be a constitutional violation. [442 U.S. at 382-385; footnotes omitted.]

The holding of the majority below that § 1985(3) is applicable where the plaintiff's claim has a Fourteenth Amendment base even though the record shows that the objective of the conspiracy does not encompass governmental interference with the plaintiff's claimed constitutional right is therefore fundamentally unsound.

(b) A precise definition of the "invidiously discriminatory motivation stressed by the sponsors of the [success-

ful] limiting amendment [to § 2 of the 1871 Act]" (*Griffin*, 403 U.S. at 101) that brings a conspiracy within that provision is not easily framed. But this much is plain, the broadest statement of the provision's scope by a proponent that we have found or that has been cited in the course of this litigation, is that of Sen. Edmunds who said:

> We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because h ewas a Vermonter * * * then this section could reach it. [Globe 567]

The meaning of the antithesis drawn by Sen. Edmunds, and a lucid explanation as to why its proper application to a case like this compels the conclusion that the plaintiffs here do not have a valid § 1985(3) claim, is stated by Judge Merritt in *Browder* v. *Tipton*, 630 F.2d 1149, 1154 (C.A. 6):

> By failing to show the unique fashion in which they exercise a fundamental right, plaintiffs fail to allege that they are members of a protected class. Defendants here, given their motive, would have thwarted due process for all those—and only those—who crossed [a] picket line. Crossing a picket line is not a special exercise of the right to a probable cause arrest in the same sense—to use another of [Sen.] Edmunds' examples—that being a Democrat is a discrete and particular exercise of the First Amendment. Thus, plaintiffs' class is simply one of picket line crossers. No matter how "invidious" any discrimination against this class may be, the right to cross a picket line is no more constitutionally protected than is the right to be an unpopular barn owner. [630 F.2d at 1154].

As the Tenth Circuit elaborated this point in *Silkwood* v. *Kerr-McGee Corp.*, 637 F.2d 743, 746 (C.A. 10):

> To state a cause of action under section 1985(3) the law requires prejudice against a class *quo* class. Here, * * * no general prejudice which transcends the immediate dispute is shown. Rather the hatred which defendants allegedly harbor is against [plaintiffs] arising out of the activities of the parties involved. See *Lessman* v. *McCormick*, 591 F.2d 605, 608 (10th Cir. 1979) * * *. As was aptly stated by the district court, to hold otherwise would make § 1985(3) "applicable to all conspiratorial interferences with the rights of others, as there are no bounds upon the ingenuity of counsel in pleading novel and diverse classes to fit every conceivable situation." 460 F. Supp. at 407. [637 F.2d at 748]

On the facts found below, in this case, as in *Silkwood*, "the feud, * * * is private; no general prejudice which transcends the immediate dispute is shown. Rather the hatred which defendants allegedly harbor is against [plaintiffs] arising out of the *activities of the parties involved.*" (*Id.* at 748; emphasis added.)

(c) While our showing to this point is, we believe, sufficient to require reversal of the decision below, we add one further and more general word to the foregoing discussion of the § 1985(3) concept of "class animus."

The point of the 1871 Act was to provide redress for the victims of the contemporaneous conspiratorial activities of the Ku Klux Klan: the Freedmen and those who made common cause with the Freedmen. That much is perfectly plain from the genesis of the bill and the legislative debates. And, although the matter is not entirely free from doubt, the debates indicate that while that conspiracy was the paradigm case, the Act was intended to apply to such conspiracies generally and to protect others who might find themselves in like jeopardy. The difficulty is that there is no single clear and definitive statement by the 1871 Act's sponsors of the requisites of a "Klan conspir-

acy" or of the "kind of invidiously discriminatory motivation" (*Griffin*, 403 U.S. at 101) that characterizes such a conspiracy.

The most accurate distillation of the sponsors' intent in this regard is, we believe, that the Act in general, and § 2 in particular, provides a federal cause of action against tortious wrongs motivated by an intent to "overthrow[] the political rights * * * and all constitutions and laws securing [those rights]" (Globe 516 (Rep. Shellabarger)), of a discrete group, such as the Freedmen, who claim the right to full and equal citizenship on the same terms as the other groups in our Nation. As Rep. Shellabarger stated in concluding the speech from which we have just quoted, "[T]hese banded conspirators have the political aims I attribute to them, to wit, to 'trample into dust' these newly-acquired political rights of the freedmen and the constitutions and laws which confer them * * *" (Globe 517. See also Globe App. 78 (Rep. Perry).) It was the redress of wrongdoing so motivated —wrongdoing to undo the Reconstruction Amendments— that the 42nd Congress was willing, despite its respect for the primacy of the states in protecting life and property, to recognize as within the Federal Government's proper sphere of authority. Section 1985(3) was framed, in other words, to safeguard the large public purposes of maintaining our system of government, not to police economic competition in the private sector.

II. The Analysis Of The Majority Below Does Transmute 42 U.S.C. § 1985(3) Into a General Federal Tort Law

The principal dissent below charged that the majority below "have released a brand new federal tort * * * " (App. A-48). We submit that this is a correct assessment, and show that the majority below did so: (1) by overreading *Griffin*; (2) by creating a new First (and Fourteenth) Amendment right to work for a non-union employer; and (3) by creating an *ad hoc* "class" of a kind plainly not contemplated by § 1985(3). It is concededly a

closer question whether, *if* the individual plaintiffs have stated a claim, their employer is also entitled to relief under § 1985(3). We show that the better view is that the employer is not. We conclude by quoting the principal dissent's demonstration that the "genie" which the majority has released cannot be reconfined in his bottle on any principled basis; the majority's theory violates the precepts of *Griffin* by 'interpreting § 1985(3) as a general federal tort law." (403 U.S. at 102.)

1. Plaintiffs' claim fails because they did not prove (or indeed present any evidence) that the objective of the conspiracy encompassed any governmental interference with an associational freedom. As shown *supra* pp. 37-39, such proof is essential to their cause of action. That proposition is demonstrated by Justice Stevens in his concurring opinion in *Novotny* (442 U.S. at 381-385)[9] from which we quoted above, and in his opinion as a Court of Appeals Judge in *Dombrowski* v. *Dowling*, 459 F.2d 190 (C.A. 7).

The majority of the court of appeals in this case acknowledged that its decision is in conflict with *Dombrowski* but considered the latter case (and Justice Stevens' concurrence in *Novotny*) to be inconsistent with the "Supreme Court's express reasoning in *Griffin*" (App. A-12); in its view, the "clear decisional words in *Griffin* simply will not permit us to speculate that section 1985 (3) might not afford a remedy for private conspiracies" (App. A-13). We submit that in so concluding the majority below missed the critical distinction drawn in the *Dombrowski* opinion "between the interests of the plaintiff that the statute was enacted to protect and the conduct of the defendants which it proscribes" (459 F.2d at 193).

Dombrowski makes clear that the "clear, decisional words in *Griffin*" on which the majority below relied

[9] Justice Powell expressed his agreement with Justice Stevens' views (442 U.S. at 378).

were addressed only to the latter question, *viz.* whether some form of *governmental participation in the conspiracy itself* is an essential requirement of a cause of action under § 1985(3). That was the question which *Collins* v. *Hardyman*, *supra*, 341 U.S. 651 had answered in the affirmative, and which *Griffin*, overruling *Collins*, answered in the negative. As the Seventh Circuit said in *Dombrowski*, "although *Griffin* makes it perfectly clear that some purely private conspiracies among defendants are proscribed by § 1985(3), *Griffin* did not purport to delineate the scope of the rights secured by the statute." (459 F.2d at 194.) Since the conspiracy in *Griffin* was directed against rights which the Constitution protects against private interference, "the Court did not have occasion to consider the effect of the statute on private conspiracies designed to deprive the plaintiff of rights protected by the Fourteenth Amendment." (459 F.2d at 195.)

2. In ruling that "merely working for a nonunion employer [does] qualify for constitutional protection" (App. A-12) the majority below broke new constitutional ground by misinterpreting the precedents relied upon.

The majority below said that the "Supreme Court has long recognized that association for the purpose of advancing economic, as well as political or religious, interests falls within the protection of the First Amendment" and "that the corollary of the right to associate to advance economic interests is the right not to associate." (App. A-13, citing *Trainmen* v. *Virginia*, 377 U.S. 1, 8 and *Thomas* v. *Collins*, 323 U.S. 516, 531 for the first proposition and *Abood* v. *Board of Education*, 431 U.S. 209 for the "corollary.") But the proposition that, "[t]o compel employees financially to support their collective-bargaining representatives has an impact upon their First Amendment interests" (App. A-13, quoting 431 U.S. at 222), does not remotely lead to the conclusion that an individual has a constitutional right to work for a nonunion employer. To draw that conclusion

from *Abood* is to overlook the Court's explanation that the "impact upon [employees'] First Amendment interests" is due to their possible "ideological objections" to the union's activities. (431 U.S. at 222.) It is for that reason, as the *Abood* Court developed, that "To be required to help finance the union as a collective-bargaining agent might well be thought * * * to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." (*Id.*)

The conspiracy found in this case, however, was not to compel the individuals who worked for Cross to become members of a union; indeed it was found (and respondents have acknowledged) that some of Cross' employees were already union members (App. A-5; see Br. in Opp. to Pet. for Cert., p. 15, n.5 cont.).[10] Nor was it found that the defendants' purpose was to compel the making of payments to a union under a union security provision, as in *Abood*; indeed, such an agreement would be unlawful in Texas.[11] The object found was rather to prevent these individuals from working for a "nonunion employer" (App. A-13)[12]—an employer who did not have collective bargaining agreements with the unions. That

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[10] Moreover, as the principal dissent observes with respect to the two individual plaintiffs: "Scott was a supervisor and Matthews was a clerical worker. It has not been shown that either of them was even eligible for membership in any of the unions involved." (App. A-43.)

[11] Texas' Right to Work Law prohibits the denial of employment to anyone because of a failure to pay "any fee, assessment, or sum of money whatsoever" to a union. (Tex. Rev. Civ. Stat. Ann. art. 5154a(8a) (Vernon 1971). See App. A-42-43, n. 39.)

[12] To be sure, as the dissenting judges elaborated (App. A-43) the majority below resorts to a variety of locutions in describing the object of the conspiracy. However, our statement in the text is acknowledged by the majority's own statement of the issue (App. A-13.)

is not an associational interest as described in any cases cited by the majority below. It has no ideological content. It does not involve membership in any organization (political or economic) or participation in an "assembly" as that term is used in the First Amendment. (Cf. *DeJonge* v. *Oregon*, 299 U.S. 353; *Thomas* v. *Collins*, *supra*). It relates only to a purely economic relationship. Under the theory of the majority below every relationship between a worker and an employer or any business relationship between any persons would be an "association" protected by the First Amendment. There is no precedent in this Court for that proposition. To the contrary in *Smith* v. *Arkansas State Highway Employees*, 441 U.S. 463, the Court ruled:

> In the case before us, there is no claim that the Highway Commission has prohibited its employees from joining together in a union, or from persuading others to do so, or from advocating any particular ideas. There is, in short, no claim of retaliation or discrimination proscribed by the First Amendment. Rather, the complaint of the union and its members is simply that the Commission refuses to consider or act upon grievances when filed by the union rather than by the employee directly.
>
> Were public employers such as the Commission subject to the same labor laws applicable to private employers, this refusal might well constitute an unfair labor practice. We may assume that it would and, further, that it tends to impair or undermine—if only slightly—the effectiveness of the union in representing the economic interests of its members. Cf. *Hanover Township* [*Federation of Teachers v. Hanover Community School Corp.*, 457 F.2d 456 C.A. 7).[13]]

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[13] The Seventh Circuit had there stated:

> [The constitutionally] protected "union activities" include advocacy and persuasion in organizing the union and enlarging its membership, and also in the expression of its views to

> But this type of "impairment" is not one that the Constitution prohibits. Far from taking steps to prohibit or discourage union membership or association, all that the Commission has done in its challenged conduct is simply to ignore the union. That it is free to do.

3. As the principal dissent below observed, "we search the majority opinion in vain for something more than an ad hoc definition of the class to which the [individual] plaintiffs * * * belong. * * * The plaintiffs are, we submit, not members of a class at all, but simply two individuals injured in the same assault." (App. A-43, A-44; footnote omitted.) And we cannot improve on that dissent's showing that even if there is a coherent class it is not one protected by § 1985(3):

> If the class recognized by the majority includes, as we have supposed, persons who do not belong to a union and who want to work for an employer who hires other nonunion employees, there are yet other reasons not to accord such a class § 1985(3) protection. This class is one newly defined by this case, not one having any previous discernible jurisprudential identity. It is not a "class" marked by historical oppression, by minority status, by any social or political animus directed against it, by any political or religious belief, or by any of the indicia usually used to identify a class of persons who must be accorded special protection. The animus here was not

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employees and to the public. For that reason, the State may not broadly condemn all union activities or discharge the employees simply because they join a union or participate in its activities. It does not follow however, that all activities of a union or its members are constitutionally protected.

Thus, the economic activities of a group of persons (whether representing labor or management) who associate together to achieve a common purpose are not protected by the First Amendment. Such activities may be either prohibited or protected as a matter of legislative policy. [457 F.2d at 460-461, footnotes omitted.]

See also the principal dissent below App. A-42 to A-43.

> directed at the membership of the plaintiffs in such a class or at their association together either as persons or in some anti-union group campaign, but at their *activities*: working without union membership for an employer who wished to hire them. [App. A-46.]

If the First Amendment right to associate does not encompass the right to bargain collectively (and in *Smith*, state action was unmistakably present), the right *not* to associate cannot include the right *not* to bargain collectively. (See also the *Browder* and *Silkwood* decisions quoted *supra*, pp. 40-41.)

4. Having given § 1985(3) relief to the individual plaintiffs by defining an *ad hoc* class, "not having any previous discernible jurisprudential identity" (principal dissent, App. A-46), the majority below tightened the ratchet another notch for the benefit of the plaintiff Cross Corporation by observing that the "language of section 1985(3) specifically provides a remedy for any person injured by an act taken in furtherance of the conspiracy," (App. A-19). That is also the view expressed by Justice White in his dissenting opinion in *Novotny*, 443 U.S. at 390. The principal dissent in this case, however, considered that Justice White's view was rejected by the Court's holding in *Novotny* "that § 1985(3) created no new rights but is remedial in nature," thereby precluding "a substantive cause of action in the statute for non-class members." (App. A-47.) This interpretation of *Novotny* is buttressed when it is appreciated that if it had been thought that such a cause of action lies, the Court would have been required to decide whether Mr. Novotny was entitled to relief on the theory that he had been injured by a conspiracy against *women* satisfying the elements of a § 1985(3) claim, rather than being able to limit its consideration to the question whether § 1985(3) provided a remedy for a violation of Mr. Novotny's rights under Title VII of the 1964 Civil Rights Act. But as the Court's opinion in *Novotny* did not *ex-*

pressly reject the possibility of relief for non-class members, we shall briefly comment further on this issue.

As an original proposition the argument from the language of § 1985(3) is not without force, especially since the language is not narrowed by the debates, which only refer to, but do not explain the inclusion of a damage remedy in § 2 of the 1871 Act. However, the parallel remedial language of § 1 of that Act, now 42 U.S.C. § 1983, is equally broad; yet this Court held in *Warth* v. *Seldin*, 422 U.S. 490, 514, that a party who is not in the protected class may not recover under that provision. Moreover, while it is ordinarily presumed that Congress has provided a remedy to persons or classes for whose special benefit legislation is enacted, it is likewise reasonable to assume, absent a clear indication to the contrary, that Congress does not intend to provide a remedy for parties who are outside the protected class. It seems unrealistic, if not anachronistic,[14] to attribute to the 1871 Congress an intent to separate right from remedy in the very amendment to the bill which was adopted to accommodate the insistence of the moderate Republicans that Congress enforce the Reconstruction Amendments without interfering with the authority of the States.

At the conclusion of its discussion of the scope of the protected class (App. A-20) the majority below endeavors, in the dissenting judges' apt metaphor, to reconfine the genie in the bottle. The principal dissent's critique merits quotation in full:

> Recognizing implicitly that they have released a brand new federal tort, our colleagues attempt in dicta to enclose this genie in a larger bottle. They say that they would not extend § 1985(3) to *every* kind of unlawful conduct, only to the limited instance where "there is no campaign to organize employees *and* force or violence is used to stake out one group's territorial claim and to deprive other workers and

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[14] Cf. *Hayes v. Michigan Central R.R. Co.*, 111 U.S. 228, 239-240 (1884).

their employer of the right to freely associate with one another." We see no basis in the statute for distinguishing violent unlawful conduct from other kinds of unlawful activity such as unfair labor practices, secondary boycotts, and criminal libel, or, indeed, criminally reckless driving. The rationale of the decision cannot be thus confined save by ipse dixit. (If the decision is based on principle, and not like Justice Roberts' railway ticket, "good for this day and train only," it extends logically not only to a multitude of "classes" having some sort of economic or "associational" tie but protects each member of those classes against any kind of unlawful conduct that results in bodily injury, or even, perhaps, economic harm. [App. A-48 to A-49; footnotes omitted.]

CONCLUSION

For the above-stated reasons, the judgment of the court of appeals should be reversed with directions to remand this cause to the district court for dismissal of the complaint.

Respectfully submitted,

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NO. 82-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 610 (AFL-CIO), ET AL.,
Defendants-Petitioners,

v.

PAUL E. SCOTT, ET AL.,
Plaintiffs-Respondents.

Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

1. Whether the court below erred in holding that 42 U.S.C. § 1985(3) provides a remedy for injuries suffered by nonunion workers and their employer in an episode of mob violence resulting from a private conspiracy motivated by a class-based invidiously discriminatory animus.

2. Whether the court below erred in holding that animus against persons because of their nonunion associations or "outsider" status may constitute "class-based, invidiously discriminatory animus" for the purposes of 42 U.S.C. § 1985(3).

3. Whether the court below erred in holding that both the employer and his workers who were the victims of conspiratorial violence may recover under 42 U.S.C. § 1985(3) for injuries suffered as a result of that violence.

DESIGNATION OF CORPORATE RELATIONSHIPS

The A.A. Cross Construction Company, Inc., filing this Brief for Respondents in this proceeding, states that:

1. No relevant changes have occurred since its original designation of corporate relationships.
2. The A.A. Cross Construction Company, Inc. is not owned by any parent corporation.
3. The A.A. Cross Construction Company, Inc., does not have any ownership interest in any subsidiaries.
4. The A.A. Cross Construction Company, Inc. does not have any affiliates.

A.A. Cross Construction
Company, Inc.
Dated: March 15, 1983

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NO. 82-486

IN THE

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OCTOBER TERM, 1982

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 610 (AFL-CIO), ET AL.,
Defendants-Petitioners,

v.

PAUL E. SCOTT, ET AL.,
Plaintiffs-Respondents.

Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1985(3) (Supp. III 1979), Rev. Stat. § 1980, provides:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the

premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property or account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

This is an action brought under 42 U.S.C. § 1985(3) by two construction workers and their employer, A.A. Cross Construction Company, for injunctive relief and damages against certain unions and some of their individual members. The complaint alleged that defendants conspired to deprive plaintiffs of the equal protection of the laws and equal privileges and immunities under the

laws, and pursuant to this conspiracy, planned and executed an attack on plaintiffs causing them injury.

The following passage from the lower court's statement of background facts is added to supplement Petitioners' Statement of the Case.

> On the morning of January 17, after most of the Cross employees had arrived at work, a crowd of nearly three hundred people assembled at the main access road leading to the Cross construction site. . . . The crowd began to get unruly, pushing and shoving the remaining Cross workers as they arrived. Nevertheless, Cross's employees began work as usual. Then, shortly after 7:00 that morning, a group of four pickup trucks, each carrying between twelve and eighteen persons, emerged from the crowd gathered at the access road and drove onto the jobsite. Plaintiff Scott went out to meet the intruders and to request them to leave the area, but one of them approached Scott and said, "Man, you all have got to be crazy . . . this is a union town." Scott told his interlocutor that they did not want any trouble, and he attempted to gather together the other employees and to leave the jobsite. However, before he could complete his mission, someone stepped out of the group and struck him on the head. Suddenly, the mob swarmed over the construction site, brutally beating Cross and his employees with iron rods and wooden boards, overturning and setting fire to the trailer that served as the construction site office, smashing automobile and truck windshields, and vandalizing company tools and equipment.

Scott v. Moore, 680 F.2d 979, 983-84 (5th Cir.), *cert. granted sub nom. United Brotherhood of Carpenters and Joiners of America, Local 610 v. Scott*, 103 S. Ct. 442 (1982) (No. 82-486).

The district court issued temporary and permanent injunctions against further violence and awarded damages to plaintiffs against eleven of the defendant unions. *Scott v. Moore*, 461 F. Supp. 224 (E.D. Tex. 1978), *aff'd in part and rev'd in part*, 640 F.2d 708 (5th Cir. 1981). On appeal, both a panel of the court of appeals and, on rehearing *en banc*, the entire court affirmed the district court judgment with respect to three of the unions, the present Petitioners.

Petitioners challenge the holding of the court below that Respondents established a cause of action under 42 U.S.C. § 1985(3). Petitioners do not challenge the holding that the Norris-Laguardia Act, 29 U.S.C. § 101-115 is inapplicable to this case or the holding that the application of § 1985(3) to the facts of this case is within the constitutional authority of Congress under the commerce clause.

SUMMARY OF ARGUMENT

In part I, we point out that the Court's conclusions in *Griffin v. Breckenridge*, 403 U.S. 88 (1972) and its analysis of § 2 of the Civil Rights Act of 1871, now 42 U.S.C. § 1985(3), are entirely correct. The Court in *Griffin* overruled *Collins v. Hardyman*, 341 U.S. 651 (1951), and concluded that § 1985(3) is applicable to *private* conspiracies where there is "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 102. The elements of a § 1985(3) cause of action are (1) a conspiracy (2) for the purpose of denying equality of rights and (3) acts pursuant to the conspiracy whereby another is either (4a) "injured in his person or property" or (4b)

deprived of a "right or privilege of a citizen of the United States." 403 U.S. at 102-03. The Court also made clear in *Griffin* that the statutory question of the coverage of § 1985(3) must be determined independently of the constitutional question of the authority of Congress to reach the activity involved in a particular case. Although the complaint in *Griffin*, like the complaint in the present case, alleged violations of first amendment rights and of state law rights of personal security, constitutional authority for Congress to reach the defendants' conduct was found on the basis of the thirteenth amendment and the constitutional right of interstate travel. The constitutionality of the application of § 1985(3) to the factual situation of the present case was upheld on the basis of the commerce clause, and Petitioners do not challenge this holding. However, Petitioners assert that because the lower court found first amendment rights were infringed, Respondents can recover only if this Court now decides that the fourteenth amendment grants Congress the power to reach private conspiracies, absent any "state action" allegation. This confuses the question of the scope of § 1985(3) with the independent finding of the lower court that congressional authority to reach the conduct in this case is found in the commerce clause.

In part II, we undertake to apply the analysis in *Griffin* to the case now before this Court. There was no discussion of three of the § 1985(3) elements—the court of appeals having found the following: (1) existence of a conspiracy, (3) that there were acts done pursuant to the conspiracy whereby another (4a) was injured in his person or property. Therefore, the court's discussion focused only on whether (2) the conspiracy was for the "purpose of depriving, either directly or indirectly, any person or class

of persons of the *equal* protection of the laws, or of *equal* privileges and immunities under the laws". 42 U.S.C. § 1985(3) (emphasis added).

The court below was concerned only to determine if the second element of a § 1985(3) cause of action had been met—the motivation aspect. All discussion of the first amendment right of association was in this context only.

The fourth element of a § 1985(3) cause of action as analyzed in *Griffin* is a showing that plaintiff was either "(4a) 'injured in his person or property' or (4b) 'deprived of . . . any right or privilege of a citizen of the United States.' " 403 U.S. at 103. The question whether § 1985(3) reaches private violations of fourteenth amendment rights—that is, whether such violations constitute a deprivation of "any right or privilege of a citizen of the United States" under *Griffin's* (4b) does not arise in a case where plaintiff states a cause of action under (4a) by alleging injury to person or property. There is no need to reach the constitutional question of whether the Act will apply to injury to fourteenth amendment rights *only*, because Respondents here have alleged and shown injuries to person and property under *Griffin's* element (4a). Whether or not § 1985(3) is interpreted as remedying private violations of fourteenth amendment rights, it certainly remedies injuries to person and property resulting from mob violence motivated by the requisite animus. The lower court's discussions of associational infringements were properly confined to its discussion of element (2), the motivation requirement. There is simply no element (4b) issue to be decided in this case.

The court found that Petitioners *"sought to deny* completely the plaintiff employees' right not to associate" by

threatening and committing violent acts to require plaintiffs to "leave the area or concede to union policies and principles". *Id.* (Emphasis added). The conclusion of the court below that § 1985(3) "encompasses a conspiracy *designed to deprive* nonunion workers of the first amendment right to freely associate with one another" (*Id.* at 1004) (emphasis added) is a correct interpretation of the statute's motivation element (2) and in accord with the decisions of this and other courts.

The district court found that the purpose of the conspiracy was "to intimidate and coerce these nonunion people from working or being employed within a 'union area' ". *Scott v. Moore,* 461 F. Supp. at 230. Affirming, the court of appeals stated: "the conspiracy in this case was motivated by a prounion animus so strong that it staked its claim not merely ideologically, but geographically. The nonunion plaintiffs were repeatedly told that they were in union country and would be punished for choosing to work there nonunion". 680 F.2d at 992. Findings as to motive are "peculiarly factual issues for the trier of fact", *Pullman-Standard v. Swint,* 102 S. Ct. 1781, 1790 (1982). The findings below as to defendants' motive are supported by the record and therefore conclusive here.

Further, we show the Court that there is no standing issue raised by Petitioners. The statute itself does not place any limitation on traditional concepts of standing and the "class" modifier in element (2) does not restrict an element (4a) recovery. The Respondent, A.A. Cross Construction Company may recover for injuries suffered as a result of conspiratorial violence motivated by an animus against the nonunion associations or outsider status of his employees. The plaintiff employer was an object of this animus because

he hired nonunion, out-of-town workers and, therefore, he should be considered a member of the group toward which Petitioners' animus was directed. In any event, the plaintiff employer may recover, as the court below held, because the statute on its face, its legislative history, and this Court's decision in *Griffin* all make clear that a § 1985(3) plaintiff need not be a member of the class which is the object of the animus, only "another" injured in his person or property.

In part III, we refute Petitioners' analysis of the legislative history. Petitioners' attack on the holding of the court below that plaintiffs have established a § 1985(3) cause of action is based almost entirely on a review of the legislative history of § 2 of the 1871 Civil Rights Act. Reasserting a state action requirement explicitly rejected in or inconsistent with *Griffin*, Petitioners in essence ask the Court to reconsider and reject *Griffin's* analysis of § 1985(3).

Petitioners' review of the legislative history of the Act succeeds in showing only that the Court's reading of that history in *Griffin* is correct: the bill as introduced covered all private conspiracies violating personal or property rights; it was amended to limit the "enormous sweep of the original language" (403 U.S. at 100); and the limitation adopted was not, as Petioners contend, any form of state action requirement or exclusion of certain types of rights, but was instead the addition of a requirement of a motive to deny equality of rights. Petitioners' basic contention, that Congress did not intend § 1985(3) to reach private conspiracies to infringe rights protected against state infringement by the fourteenth amendment, is not supported but refuted by the legislative history.

ARGUMENT

I. *GRIFFIN V. BRECKENRIDGE* DEFINES THE ELEMENTS OF A CAUSE OF ACTION UNDER SECTION 1985(3)

A. Section 1985(3) Reaches Private Conspiracies

The modern law of § 1985(3) begins with this Court's decision in *Griffin v. Breckenridge,* 403 U.S. 88 (1971). In *Collins v. Hardyman,* 341 U.S. 651 (1951), the Court had in effect read into the statute a "state action" or "under color of state law" requirement, making it inapplicable to purely private conspiracies. In *Griffin,* however, the Court saw "[l]ittle reason . . . not to accord to the words of the statute their apparent meaning," and "the words of the statute," it noted, "fully encompass the conduct of private persons." 403 U.S. at 96. The Court pointed out in *Griffin* that it is easy to be misled by the similarity of the equal protection language in § 1985(3) to language in § 1 of the fourteenth amendment.[1] "Yet there is nothing inherent in the phrase [equal protection] that requires the action working the deprivation to come from the State. *See, e.g., United States v. Harris,* 106 U.S. 629, 643."[2]

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1. The fourteenth amendment, however, does not refer to the deprivation of *equal* privileges and immunities and refers only to "the privileges or immunities *of citizens of the United States.*" U.S. CONST. amend. XIV, § 1 (emphasis added).

2. *Harris* further states:

> A private person cannot make constitutions or laws, nor can he with authority construe them, nor can he administer or execute them. The only way, therefore, in which one private person can deprive another of the equal protection of the laws is by

It therefore appears that Congress intended the section to apply to "*all* deprivations of 'equal protection of the laws' and 'equal privileges and immunities under the laws,' whatever their source." 403 U.S. at 97. That Congress intended § 1985(3) to reach private action does not mean that Congress intended to provide a federal remedy for "all tortious, conspiratorial interferences with the rights of others." 403 U.S. at 101. The legislative history of the statute and the requirement of a denial of "*equal* protection, or *equal* privileges and immunities," added by an amendment to the original bill, make clear that Congress was concerned with providing a remedy only for denials resulting from the "kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment." 403 U.S. at 102.

B. The Coverage of § 1985(3) and the Constitutionality of Its Application are Separate Questions

The Court also made clear in *Griffin* that the statutory question of the coverage of § 1985(3) is separate and distinct from the constitutional question of the authority of Congress to reach conduct within that coverage in the circumstances of a given case. The constitutional authority of Congress to reach the conduct complained of in *Griffin* was found on the basis of the thirteenth amendment or the constitutional right of interstate travel. In the present case, the constitutional authority of Congress to apply § 1985(3) to the conduct involved was found by

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the commission of some offense against the laws which protect the rights of persons, as by theft, burglarly, arson, libel, assault, or murder.

the court below on the basis of the commerce clause. U.S. CONST. art. I, § 8. That finding has not been challenged by Petitioners in this Court.

C. *Griffin* Does Not Support Petitioners' Assertion of a State Action Requirement

Petitioners assert that the legislative history requires some form of state involvement before a case can be made out under 42 U.S.C. § 1985(3). Presumably, Petitioners would except from this requirement those few rights which citizens are said to enjoy against all interferences. These include the right not to be enslaved, the right to travel, and perhaps one or two others. All other rights, such as equal protection or first amendment rights, are said to require some form of state involvement. While it is unclear from the Petitioners' discussion precisely what form of state involvement is required, it would appear from their analysis of the debates that the requisite state action could take the form of negligence, maladministration, refusal to enforce, or, perhaps, a conspiracy aimed at interfering with equal protection by the state. These and other possibilities are suggested in Petitioners' Brief at p. 38, and it is nowhere made clear just which one, in their view, is a requirement under 42 U.S.C. § 1985(3).[3]

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3. Petitioners' Brief at p. 29 attempts to equate their view of the statute with Justice Stevens' concurrence in *Great American Federal Savings and Loan Association v. Novotny*, 442 U.S. 366, 382-85 (1979) (Stevens, J. concurring). Petitioners will find no comfort in Justice Stevens' views. The concurrence in *Novotny* emphatically states that "the requirement of state action, in this context, is no more than a requirement that there be a constitutional violation." State action in a constitutional sense must pass the test set out in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). None of Petitioners' suggested forms of state involvement would pass this test.

Although Petitioners' views of the requisite quantum of state involvement are apparently unsettled, a choice is unnecessary. All of Petitioners' suggested forms of state involvement were specifically raised and rejected by this Court in *Griffin v. Breckenridge*. *Griffin* considered three possible forms of state action limitation: (1) action under color of state law, (2) interference with or influence upon state authorities, and (3) popular resistance sufficient to supplant governmental authority. Each of these possibilities was considered and rejected by the Court.[4] 403 U.S. at 98-99. Thus, *Griffin* not only decided that private conspiracies, *not* acting under color of law, could be reached by § 1985(3), but also held that there was no requirement for an usurpation of, or interference with, state protection of the laws.

Petitioners appear to assert that *Griffin's* holding applies only to those few rights which are applicable to private parties outside of the fourteenth amendment. Such an assertion blatantly ignores the fact that *Griffin* was a case asserting, *inter alia*, a violation of equal protection and was decided along those lines. *See, e.g.*, 403

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4. The Court noted that the Congress that passed the Civil Rights Act of 1871 "dealt with each of these three situations in explicit terms in other parts of the same Act." 403 U.S. at 99. The first section of the Act, now 42 U.S.C. § 1983, reaches deprivations inflicted under color of state law. There is a separate clause in section 1985(3) itself that reaches conspiracies "for the purpose of preventing or hindering the constituted authorities of any State . . . from . . . securing to all persons . . . the equal protection of the laws." And section 3 of the 1871 Act dealt specifically with the situation where state authorities were rendered powerless because of "massive private lawlessness." "Given the existence of these three provisions," *Griffin* concluded, "it is almost impossible to believe that Congress intended, in the dissimilar language of the portion of § 1985(3) now before us, simply to duplicate the coverage of one or more of them." 403 U.S. at 99.

U.S. at 97. Thus, *Griffin* itself dealt with a fourteenth amendment right.[5] Under the Petitioners' analysis, Respondents would be required to plead and prove some form of state involvement before making out the very case decided in *Griffin v. Breckenridge*.

It therefore appears that Petitioners' position is diametrically opposed to this Court's holding in *Griffin v. Breckenridge* and must be rejected for that reason alone. *Griffin* holds that the only requisites for making out a violation of § 1985(3) are a conspiracy, a class-based invidiously discriminatory animus, an act in furtherance of that conspiracy and constitutional *or* personal injuries. Petitioners' attempt to engraft a state action limitation simply cannot be squared with *Griffin's* understanding of the legislative intent.

5. Although *Griffin* addresses the right to travel and the thirteenth amendment, this discussion is germane only to the source of congressional power. It was only after deciding that the plaintiffs had stated a claim of a violation of equal protection that the Court turned to the source of congressional power to reach such private conspiracies.

II. THE COURT BELOW CORRECTLY APPLIED *GRIFFIN V. BRECKENRIDGE*

A. Petitioners Have Conspired to Deprive Respondents of the Equal Protection of the Laws

Although the court below held that plaintiffs can recover under § 1985(3) for a violation by private persons of plaintiffs' constitutional right of association, it is unnecessary to reach any constitutional issue here. Infringement of a constitutional right is not a necessary element of a § 1985(3) cause of action. Section 1985(3) provides a civil remedy for private conspiracies aimed at deprivation of the *equal* protection of the laws. *Griffin* did not hold that the deprivation must involve the violation of some other constitutional right, and neither the text of the statute nor its legislative history supports such a requirement.[6]

The elements of a § 1985(3) violation aimed at equal protection are no more and no less than those announced by this Court in *Griffin*. The statute requires only (1) a conspiracy (2) motivated by an intent to further a class-based invidiously discriminatory animus, (3) where an act is taken in furtherance of that conspiracy, and (4a) personal or property injuries are sustained *or* (4b) one is 'deprived of having and exercising any right or privilege of a citizen of the United States.' 403 U.S. at 102-03.

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6. As the principal dissenting opinion below stated, § 1985(3) is "not designed to protect constitutional rights; it is at once narrower, safeguarding equality, and broader, protecting against any conspiracy to deny equal protection of the 'laws.'" *Scott v. Moore*, 680 F.2d 979, 1012 (5th Cir. 1982) (Rubin, J. and Williams, J., dissenting).

1. Motivation—Element (2)

Griffin held that the necessary second element of a cause of action under section 1985(3), "specifying the motivation required," is an allegation that the defendants conspired " 'for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.' " 403 U.S. at 96, 102-03. The Court did not hold that this requirement can be met only when constitutional rights are involved. On the contrary, the Court explicitly stated that "intent to deprive a person of a federal right" is *not* required by § 1985(3):

> The motivation requirement introduced by the word "equal" into the portion of § 1985(3) before us must not be confused with the test of "specific intent to deprive a person of a federal right made definite by decision or other rule of law" articulated by the plurality opinion in *Screws v. United States*, 325 U.S. 91, 103, for prosecutions under 18 U.S.C. § 242 . . . ***The motivation aspect of § 1985(3) focuses not on scienter in relation to deprivation of rights but on invidiously discriminatory animus.***

403 U.S. at 102 n.10 (emphasis added and citations omitted). Thus the necessary motivation is present when the animus behind the conspirators' actions is invidious and discriminatory. Such an animus defines and constitutes a deprivation of *equal* protection or *equal* privileges and immunities. When the first three elements of *Griffin* are met, the fourth element—the damage element—allows for recovery of damages to persons or property *or* for the deprivation of the rights of citizenship. However nothing in the statute, or in *Griffin*, requires the actual deprivation

of a constitutional right as part of the motivational element of § 1985(3).

The Court in *Griffin* illustrated a private deprivation of the equal protection of the laws, *citing United States v. Harris,* 106 U.S. 629, 643 (1883), where the Court stated:

> The only way, therefore, in which one private person can deprive another of the equal protection of the laws is by the commission of some offense against the laws which protect the rights of persons, as by theft, burglarly, arson, libel, assault or murder.

403 U.S. at 97. In *Harris,* the Court dealt with § 5519 of the Revised Statutes (*repealed,* 35 Stat. 1154 (1909)), identical to § 1985(3) except that it provided a criminal penalty. The Court held in *Harris* that § 5519 was intended to reach private action. As an integral part of this holding, the Court concluded that the section's coverage was not limited to deprivations of constitutional rights. In its attempt to find a constitutional basis for § 5519, the Court discussed separately the authority derived by Congress from the fourteenth amendment, the thirteenth amendment, and the privileges and immunities clause of article IV, § 2. In each of these discussions, the Court interpreted § 5519 as applicable to deprivations of rights under state laws. The "gravamen of the charge against the accused is," the Court found, "that they conspired to deprive certain citizens . . . of the equal protection accorded them by the laws of Tennessee", by beating and committing other acts of violence against them. 106 U.S. at 643. The Court held that under § 5519, "private persons are liable to punishment for conspiring to deprive any one of the equal protection of the *laws enacted by*

the State," and that the indictment would therefore be good under § 5519 if it were constitutional. Because the Act was directed "exclusively against the action of private persons," however, the Court ruled that it exceeded the power of Congress to enforce the fourteenth amendment. *Id.* at 639-40.

Harris was decided only twelve years after the passage of the Civil Rights Act of 1871. *Griffin* relied upon *Harris* to show that § 1985(3) was also applicable to such private conspiracies. The legislative history is fully in accord with the position taken in *Griffin* and *Harris.* Congress was concerned to prevent the denial of equality—the injuring of another because of animus against a despised class. The equal protection moiety of § 1985(3) addresses itself to equality with respect to state rights. It becomes operational when violence is directed against persons because of their perceived membership in a group.

> If, in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter, (which is a pretty painful instance that I have in my mind in the state of Florida within a few days where a man lost his life for that reason) then this section could reach it.

GLOBE, p. 567 (Sen. Edmunds).

As discussed more fully *infra,* the original version of § 1985(3) was amended because it implicated state created rights. However, "[t]he explanations of the added language centered entirely on the animus or motivation that would be required, and there was no suggestion whatever that liability would not be imposed for purely private

conspiracies." 403 U.S. at 100. In its interpretation of the limiting amendment as adding a motivation requirement, *Griffin* relied on Representative Willard's explanation. 403 U.S. at 100. Willard objected to the original version as granting the United States "original jurisdiction of all offenses against life, property, or person, although such offenses might be committed within the limits of a State. . . ." GLOBE, App. p. 188. The limiting amendment "obviated what I regarded as a fatal objection to the section . . . by providing that the essence of the crime should consist in the intent to deprive a person of the equal protection of the laws. . . ." *Id. See also* GLOBE, p. 478 (Rep. Shellabarger) (cited at 403 U.S. at 100).

Thus, the limiting amendment imposes the element of an intent to deny equality, which *Griffin* interpreted to mean a requirement of invidiously discriminatory animus. If such animus is found, the remedy provided in the statute would be available in cases involving conspiracies to murder, assault and commit battery on persons or to damage property. These were precisely the injuries which led to the passage of the Act. The purpose of the limiting amendment was *not* to remove these personal injuries from the Act's coverage, any more than it was to remove private conspiracies, but only to confine that coverage to cases where the requisite animus for the infliction of injuries could be shown.[7] Indeed, it was only because the statute would otherwise reach all injuries to persons and property that the invidiously discriminatory motivation

7. *See* Forward, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 99-100 (1971). Under *Griffin*, once the requisite invidiously discriminatory animus is shown, private tortious acts such as assaults constitute a basis for liability under § 1985(3) whether or not the section can be interpreted to reach private violations of first amendment rights.

requirement was injected. There would have been no basis for fear of creation of "a general federal tort law" if § 1985(3) were designed to reach only conspiracies denying constitutional rights.

2. Injury—Elements (4a) and (4b)

Section 1985(3) presents plaintiffs with two sets of alternatives. The defendant's motivation may be either for the purpose of depriving any person (2a) of the equal protection of the laws *or* (2b) of equal privileges and immunities under the laws. In either case, damages may be awarded for (4a) injury to person or property *or* (4b) deprivation of having and exercising any right or privilege of a citizen of the United States.

The present case involves recovery for damages under (4a). Only when the analysis reaches element (4b) does the question arise whether a private deprivation of a fourteenth amendment right meets the requirement that another be "deprived of . . . any right or privilege of a citizen of the United States." Only if the plaintiff alleges no (4a) injury to person or property and relies solely on an alleged deprivation of a citizenship right must the court decide whether § 1985(3) reaches private violations of fourteenth amendment rights. Under either (2a) or (2b), the requirement is only that there be animus in relation to rights. The conspiracy must be animated by hostility towards the exercise or enjoyment of rights. No *deprivation* need exist, and therefore no constitutional rights are directly implicated. Because the present case falls within (4a), it is not necessary to reach any constitutional question in order to affirm the judgment below.[8]

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8. See Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era*

In the present case, Petitioners held a deeply-rooted regional prejudice against "outsider" workers who had contracted for employment on an open shop basis. This animus was so strong as to motivate Petitioners to conspire against Respondents, and in furtherance of this conspiracy, they inflicted personal and property injury on Respondents in violation of the civil and criminal laws of Texas. *Scott v. Moore,* 461 F. Supp. 224, 228 (E.D. Tex. 1978). No more is required to state a cause of action under § 1985(3).

Therefore, Respondents' recovery on this cause of action does not conflict with the holdings of either *Dombrowski v. Dowling,* 459 F.2d 190 (7th Cir. 1972) or *Great American Savings and Loan Association v. Novotny,* 442 U.S. 366 (1979) relied on by the Petitioners. These decisions involved allegations falling within *Griffin's* element (4b)—deprivation of a "right or privilege of a citizen of the United States."

In *Dombrowski,* the claim of injury was based solely on defendants' refusal to rent office space to plaintiff. Because no injury to his person or property was presented under *Griffin's* element (4a), the plaintiff could claim only a deprivation of a "right or privilege of a citizen of the United States" under (4b). Plaintiff was therefore contending that the refusal to rent space to him violated his fourteenth amendment rights. Recovery on this ground

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Amendments, 74 COLUM. L. REV. 449, 497 (1974). By focusing the motivation inquiry on the conspirators' invidiously discriminatory animus instead of on a specific intention to deprive the victim of his rights, *Griffin* equated invidiously discriminatory animus with an intent to deprive the victim of equal protection. A § 1985(3) cause of action is established, therefore, by showing the required animus and the resulting injury required by *Griffin's* elements (4a) or (4b).

would have required holding that § 1985(3) extended fourteenth amendment guarantees to purely private action, a holding the *Dombrowski* court refused to make. 459 F.2d at 196.

Similarly, the plaintiff in *Novotny* suffered no injury to person or property that would bring his section 1985 (3) action within (4a). He could recover only if "right or privilege of a citizen of the United States" under (4b) included the right, created by Title VII of the Civil Rights Act of 1964, to be free from discrimination in employment. The Court held that Title VII rights are not within the scope of (4b) and are to be enforced only through the remedial framework created by Title VII. 442 U.S. at 378.

In the present case, Respondents have alleged and proven (1) the existence of a conspiracy (2a) to deprive them of the equal protection of the laws, *i.e.* that Petitioners conspired pursuant to a class-based invidiously discriminatory animus. Petitioners (3) did and caused to be done acts in furtherance of this conspiracy which proximately caused Respondents' (4a) damages to person and property. Thus, the present case leaves open the question of whether state action is required for deprivations of fourteenth amendment rights under § 1985(3). Respondents make no claim under element (4b). The motivational element (2a or 2b) requires animus, not the deprivation of a constitutional right.

Whether or not (4b) of the Act should be interpreted to provide a remedy for denials by private persons of fourteenth amendment rights or rights created by federal laws, the Act should certainly be held to reach a factual situation nearly identical to that with which its framers

were concerned: attacking the persons and property of citizens because of their membership in a despised class. The present case involves the very type of activity which the Civil Rights Act of 1871 was designed to reach under (4a). The personal and property injuries inflicted upon Respondents in this case are precisely like those described in the legislative history of the Act. *Griffin* recognized that the Act was passed in response to these attacks as a "frank assertion of the power of the national Government to protect life, liberty, and property, irrespective of the act of the State." 403 U.S. at 101. Like *Griffin*, the present case involves conduct "so close to the core of the coverage intended by Congress that it is hard to conceive of wholly private conduct that would come within the statute if this does not." 403 U.S. at 103.

B. Petitioners Have Conspired to Deprive Respondents of Equal Privileges and Immunities

1. Motivation and Injury

A conspiracy aimed at a deprivation of equal privileges and immunities (element 2b) requires a somewhat different approach. Here, as more fully discussed *infra*, the Congress felt it could act directly. The controversy which gave rise to the limiting amendment concerned granting a federal remedy for *state* crimes. In contrast, there was never a doubt that Congress could provide redress for violations of the rights of *national* citizenship. Nevertheless, Congress chose to frame the statute in terms of "*equal* privileges and immunities". Thus, *Griffin* was perfectly justified in holding that the use of the word "equal" in that context had the same effect as in the *equal* protec-

tion context, *i.e.*, it requires class-based invidiously discriminatory animus. However, since Congress felt that it could reach these particular conspiracies in a more straightforward fashion, the animus involved is properly construed as one in relation to the exercise of these fundamental liberties.[9] Thus, if violence is directed against a group because of its perceived expression, association, etc., such violence would properly be the subject of a § 1985(3) action. Since Respondents have proven that the Petitioners (1) conspired together; (2b) in order to further a class-based invidiously discriminatory animus directed against Respondents' association; (3) that the Petitioners acted on the basis of that conspiracy with Klan-like brutality, and that; (4a) Respondents were injured in their person and property, the judgment of the court below must be affirmed.

2. First Amendment Rights

It is well settled, as the court below noted, that "the right of free association is closely aligned with the right of free speech and is similarly protected by the First Amendment"[10] (680 F.2d at 988) and "that association for the purposes of advancing economic, as well as political or religious, interests falls within the protection of the first amendment." *Id.* at 990. *E.g.*, *Abood v. Detroit*

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9. At the same time, and by the same reasoning, there need not be any specific intent to deprive a person of specific privileges and immunities. *Griffin* noted that the insertion of the word "equal" imposes a requirement of invidiously discriminatory animus but also removes any question of specific intent.

10. *NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409, 3423 (1982); *Abood v. Detroit Board of Education*, 431 U.S. 209, 233 (1977); *Healy v. James*, 408 U.S. 169, 181 (1972); *Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971).

Board of Education, 431 U.S. 209 (1977); *United Mine Workers v. Illinois State Bar Association,* 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1 (1964); *Thomas v. Collins,* 323 U.S. 516 (1945).

In the present case defendants' conspiratorial actions flowed from an animus in relation to plaintiffs' associational interests. The court below recognized that, "the corollary of the right to associate to advance economic interests is the right not to associate"; " 'that [t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests.' " 680 F.2d at 990, *quoting Abood v. Detroit Board of Education, supra. Abood* thus recognized that those choosing nonunion status enjoyed First Amendment associational rights, although those rights are of course not unlimited. The conspiracy in the present case sought to accomplish what was forbidden by *Abood.* As the court below held, the conspiracy "sought to deny completely the plaintiff employees' right not to associate" by, as the district court found, "assault[ing] the plaintiffs and 'threaten[ing] to continue violent actions if the nonunion workers did not leave the area or concede to union policies and principles.' " 680 F.2d at 990, *quoting Scott v. Moore,* 461 F. Supp. at 227. Petitioners' characterization of the present case as an attempt "to police economic competition in the private sector" (Pet. Br. 42) ignores both the importance of the associational interests involved and the seriousness of the violence.

In *Smith v. Arkansas State Highway Employees,* 441 U.S. 463, 466 (1979), cited by Petitioners, the Court ruled that the State Highway Commission had not vio-

lated any first amendment rights since, "[f]ar from taking steps to prohibit or discourage union membership or association, all that the Commission has done in its challenged conduct is simply to ignore the union." *Id.* That the defendant did not violate plaintiffs' first amendment rights in *Smith* by simply ignoring plaintiffs is hardly relevant to the situation of mob violence in the present case. The actual relevance of the *Smith* opinion to this case lies in its recognition that first amendment associational rights would be impaired by efforts to hinder workers from "joining together in a union, or from persuading others to do so, or from advocating any particular ideas." 441 U.S. at 465.

In the present case, employee plaintiffs did not claim that they had a constitutional right to work for any employer, either union or nonunion. They claimed the right to associate with other nonunion workers—on the job, in the pool hall, and on the street—free from conspiratorial violence. This is the associational right recognized by the court below. The court's holding that "the statute encompasses a conspiracy designed to deprive nonunion workers of the first amendment right to freely associate with one another" (680 F.2d at 1004) is a correct interpretation of the statute and in accordance with the decisions of this Court.

It must be emphasized that this is an element (2b) finding and goes to the motivational aspect of section 1985(3), *i.e.*, animus in relation to the rights of national citizenship. Petitioners consistently confuse this requirement with a claim for damages under element (4b) which is not involved in this case. The motivational aspect

of the Act does not by itself require deprivation of a constitutional right.

C. The Finding That Petitioners Were Motivated By A Class-Based, Invidiously Discriminatory Animus Is Correct

1. The question of appropriate class is the question of appropriate animus

Much has been written about the class basis of § 1985 (3), and the need for an "appropriate class". The key to a proper understanding of this phrase is that "class-based" modifies the word "animus". Thus the class basis is a part of the motivational aspect of § 1985(3). Since the class exists only as part of the defendants' animus, Petitioners' objections must relate to the appropriateness of the animus. There is no particular magic, nor any particular difficulty, in defining "appropriate classes" for purposes of § 1985(3). Any class is appropriate so long as plaintiffs can prove the requisite invidiously discriminatory animus.

The court below correctly ruled that "the nonunion employees in this case comprised the kind of class Congress intended to protect." 680 F.2d at 994. The court reached this conclusion, not because the class was somehow "appropriate", but because the plaintiffs had been exposed to the requisite animus.

> Although regional hostility is not an intrinsic class characteristic, those who would exercise a false territorial sovereignty by fomenting hostility against persons antagonistic to their aims *create a class* in need of federal protection of precisely the sort Congress intended to protect.

Id. (Emphasis Added.) If more "appropriateness" is needed, it is supplied by reference to legislative history. The court found that "the position of these nonunion employees in Jefferson County, Texas is markedly similar to that of the Republicans in the South" at the time of the passage of the 1871 Act. *Id.* The "pervasive regional hostility" "ignited" by the "presence of these nonunion employees in 'union country' " was very similar to the hostility against Republicans in the South during the Reconstruction era. *Id.* An Act designed to reach conspiracies based on regional hostility against Republicans, must surely also reach conspiracies based on regional hostility against nonunion workers and their association interests.

2. The lower court's finding of appropriate animus is not clearly erroneous

The findings discussed above are findings of fact with respect to motivation. This Court has only recently ruled in *Pullman-Standard v. Swint,* 102 S. Ct. 1781, 1790 (1982) that " 'findings as to the design, motive and intent with which men act' [are] peculiarly factual issues for the trier of fact," quoting *United States v. Yellow Cab Co.,* 338 U.S. 338, 341 (1949). The findings of the trial court as to the discriminatory intent with which defendants acted are fully supported by the record in this case.

Petitioners do not question the accuracy of any of the factual findings below. Cross's practice of hiring workers from outside the Port Arthur community had "provoked an antipathetic response from some segments of the Port Arthur community." "Local residents had confronted Cross employees at a local tavern and pool hall . . .

promising to make Cross 'go union', and occasionally warning of trouble if Cross did not cease hiring nonunion laborers." Cross was told that he would be "hurt . . . bad," threatened with the burning of "that big rig of yours," and warned that because " 'this is union country,' . . . if he persisted in using nonunion labor it was 'going to cost [him] a million dollars.' " The "citizens protest" to be staged at the construction site was to protest the hiring of nonunion labor and the "policy of hiring employees from outside the Port Arthur community."[11] 680 F.2d at 983. Immediately before the attack, plaintiff Scott was told by a member of the mob "Man, you all have got to be crazy . . . this is a union town." *Id.* at 984.

In fact, such animus against nonunion and out-of-town workers was actually conceded by Petitioners in the courts below. Petitioners' brief in the court of appeals stated:

> Port Arthur, Texas is one corner of a community generally referred to as the "Golden Triangle". . . . [T]he Golden Triangle area is peculiar in terms of its socio-economic structure. . . . Generally there are large numbers of working class people concentrated in the area and these workers are highly unionized. The general citizenry of the community tends to align itself on union/nonunion lines, and labor relations is always a sensitive issue in the Golden Triangle often capturing the front page of the local newspapers.

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11. At the hearing on plaintiffs' application for a temporary restraining order, the Sheriff testified: "[I]t has been our experience that the people who would be interested in inflicting harm upon these workers would make investigations such as license plates on cars and find out where they live . . . and in certain ways coerce or otherwise commit actual violence upon these people or their property away from the jobsite." Temporary Restraining Order Transcript, p. 12 (R. 34).

Original Brief of Laborers and Boilermakers to the Fifth Circuit, pp. 3-4. Petitioners' counsel stated at the trial:

> I think the evidence, your Honor, will show that what happened here is something indicative of this area we live in, and that is—not indicative of it, but arises from the fact the labor organizations are strong in this area and when outside contractors come into the area, employing people from outside the state . . . men working on jobs in the area here hear about it, they ask their unions . . . they ask their officials "do we have people working for them" . . .

Trial Transcript pp. 20-21 (R. 591-92), Opening Statement of Mr. Martin Dies. Petitioners' counsel also referred to "unrest in the community with respect to Cross Construction Co. and there was talk of some sort of citizens' protest . . . The rumor was apparently very widespread and . . . had to do with the use of out of town labor by Cross Construction. . . ." Trial Transcript, pp. 235-36 (R. 806-07), Closing Argument of Mr. William Wheat.

On the basis of the facts adduced at trial and the factual concessions of Petitioners, it simply cannot be said that the factual findings with respect to animus are clearly erroneous.

3. The lower court's interpretation of 42 U.S.C. § 1985(3) does not create a general federal tort law

As *Griffin* observed, "that the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others". 403 U.S. at 101. But very few tortious conspiracies stem from an invidiously

discriminatory motivation. The starting point, recognized in *Griffin*, is to ascertain what the framers of the Act perceived its scope to be.

> We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one [from] getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . then this section could reach it.

GLOBE, p. 567 (Sen. Edmunds).

Cases holding that no class-based animus was shown have involved purely individual disputes. In such cases, there can be no showing of "prejudice against a class *qua* class," no "general prejudice which transcends the immediate dispute." *Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743, 748 (10th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981).[12] Both *Silkwood* and *Browder v. Tipton*, 630 F.2d 1149 (6th Cir. 1980), cited by Petitioners as in conflict with the decision below, in fact state and apply this criterion—the same criterion stated and applied by the court below. Petitioners' conspiracy was motivated, not by malice against the Respondents as individuals, but by an ideological or political antipathy for the association of nonunion workers and by resentment against outsiders

12. See also *Taylor v. Brighton*, 616 F.2d 256 (6th Cir. 1980); *Baskin v. Parker*, 602 F.2d 1205 (5th Cir. 1979); *Blevins v. Ford*, 572 F.2d 1336 (9th Cir. 1978); *Askew v. Bloemker*, 548 F.2d 673 (7th Cir. 1976); *Harrison v. Brooks*, 519 F.2d 1358 (1st Cir. 1975).

coming into the area to work. The animus involved here did not arise as a result of Respondents' conduct, but existed prior to that conduct. It was only because of its prior existence that Petitioners conspired to victimize Respondents.

The distinction between personal grudges and class-based invidiously discriminatory animus is not always clear. The requisite level of animus is a function both of degree and extent. The animus is certainly of a sufficient degree if it leads to violence. It may be recalled that in its unamended version, the Act made specific mention of common law crimes of violence such as arson, murder, and the like. The reference to these crimes was deleted in order to appease those legislators who felt that Congress had no business enforcing the criminal laws of states. Nevertheless, there is no indication that the amendment was intended to broaden the scope of the statute to include non-violent conspiracies. The existence of violence or common law crime remains an excellent indicator that the requisite degree of animus exists.

The extent of the animus is also an important indicator. Certainly, it was important to the 42d Congress in to ways. First, the Congress was concerned that Klan activity, because it was regional in character, opposed the policy of national reintegration embodied in the Reconstruction acts. Second, the Klan stood for an old economic order which the infusion of free blacks and immigrants was disrupting. Thus the animus with which the framers were concerned had geographical and cultural extent.[13] The

13. Senator Frelinghausen attacked "petty, tribal sovereignties" which "affected the social and business interests of the people". GLOBE, p. 499. He expressed the views of those concerned about ". . . little principalities surrounded by walls of brass [which] wrap

scope of the animus is therefore a good indicator that it is not, in Senator Edmunds' phrase, a private barn burning. Ultimately, these are matters of degree, and are properly left to the finder of fact. The question of animus, as previously noted, is a question of "the design, motive and intent with which men act". *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949). Nevertheless, if guidelines are appropriate, a conspiracy founded in an animus so pervasive as to amount to a regional and cultural prejudice, and so strong as to lead to organized violence, is surely within the scope of the Act.

D. The Present Case Presents No Standing Issue

Section 1985(3) provides that when there is proven a conspiracy to deprive "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws" and an act done "in furtherance of the object of such conspiracy, whereby *another* is injured in his person or property, or deprived of . . . any right or privilege . . . *the party so injured or deprived* may have an action for the recovery of damages, occasioned by such injury or deprivation. . . ." (Emphasis added.) The statutory language leaves no doubt that the judgment of the court is correct. The validity of that holding is confirmed by Senator Edmunds' statement that "[t]his section gives a civil action to anybody who may be injured by the conspiracy." GLOBE, p. 568. Petitioners' position apparently relies on a purported requirement the plaintiffs be members of a "class".

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themselves up in their fancied grandeur and exclude half of the country from their borders by proscribing free speech, free thought and free action . . ." GLOBE, p. 500.

As discussed *supra*, the class concept relates only to the motivational requirement and has no relevance to standing. Notably, the statute expressly places "person" and "class of persons" in the disjunctive.

Nothing in *Griffin* suggests any special standing limitation. In fact, *Griffin* clearly establishes the contrary, since the plaintiffs in *Griffin* were twice removed from the target of the conspiracy. The plaintiffs in *Griffin* were merely passengers in an automobile owned and operated by the target of the conspiracy, R. G. Grady. Defendants believed Grady was a civil rights worker, although this belief was mistaken. 403 U.S. at 90. This Court held that plaintiffs were entitled to recover nonetheless, because "the petitioners—*whether or not the nonparty Grady was the main or only target of the conspiracy*—allege personal injury resulting from" the acts done in furtherance of the conspiracy. *Id.* at 103 (emphasis added).

In his dissent in *Great American Federal Savings and Loan Association v. Novotny*, 442 U.S. 366, 385 (1979), Justice White, relying on *Griffin*, concluded that persons injured by the private conspiracies proscribed by § 1985 (3) can redress their injuries under that statute "quite apart from any redress by those who are the object of the conspiracy. *Griffin v. Breckenridge*, 403 U.S. 88, 103." 442 U.S. at 391. The *Novotny* majority expressed no disagreement with Justice White on this point.[14]

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14. There is no merit in Petitioners' contention that Justice White's interpretation is implicitly rejected by *Novotny's* statement that section 1985(3) "is a purely remedial statute." 442 U.S. at 376. The remedial nature of the statute constitutes no ground for distinguishing between those injured persons who are and those who are not members of the class which is the object of the discriminatory animus. All

The Respondent employer's recovery is also supported by decisions under statutes related to § 1985(3), permitting recovery by plaintiffs who were not members of the class the statute was designed to protect. In *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), plaintiff, a white, had his membership share in a recreational facility revoked because he had assigned it to a black. Plaintiff brought suit for an injunction and damages under 42 U.S.C. § 1982, which provides that all citizens "shall have the same right . . . as is enjoyed by white citizens" in regard to real and personal property. Although the plaintiff was not a member of the class protected by § 1982, the Court upheld his action.[15]

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970), involved a suit by a white school teacher under 42 U.S.C. § 1983 for damages resulting from the denial "under color of law" of the right not to be discriminated against on the basis of race. The Court upheld her right to bring a section 1983 action based on a restaurant's refusal to serve her when she was with her black students.[16]

There can be no justification for reaching a different result in the present case where the statute explicitly provides for recovery by anyone injured as a result of the proscribed conspiracy.

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plaintiffs seeking recovery under section 1985(3) must show is an injury to person or property.

15. *Valle v. Stengel*, 176 F.2d 697 (3d Cir. 1949), reached the same result under 42 U.S.C. § 1981, which gives all persons the same contract rights "as enjoyed by white citizens." Accord *Walker v. Pointer*, 304 F. Supp. 56 (N.D. Tex. 1969).

16. *Warth v. Seldin*, 422 U.S. 490 (1975), relied on by petitioners, did not hold to the contrary. The Court found that plaintiffs had failed to allege injury proximately caused by defendants' actions.

III. PETITIONERS' HISTORICAL ANALYSIS IS INCORRECT

A. Petitioners Fail to Distinguish Between Protection of the Laws and Privileges and Immunities

Although incorrect in their analysis, Petitioners do appear to recognize that any interpretation of § 1985(3) must be based on congressional intent. The correct approach to this statute, as with all other statutes, is to determine what Congress sought to accomplish, rather than to debate the merit of its constitutional scholarship.

1. Privileges and Immunities

Petitioners attempt to show that there was considerable controversy surrounding the necessity for, or requisite level of, state involvement. Again, Petitioners are perfectly correct in pointing this out. Where Petitioners go wrong is in ascribing this concern to the entire subject matter of the Act. The concern with respect to state action was restricted to what might loosely be described as "the protection of the laws"—that is, personal security rights created by state law.[17] The matter arose in the context of equal protection. It was assumed by virtually

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17. There is considerable confusion in the nomenclature used by the legislators. Some believed that the privileges and immunities of national citizenship included these same personal security rights. Others clearly distinguished the privileges and immunities of *national* citizenship from those of *state* citizenship and referred to *state* privileges and immunities as "protection under the laws." For clarity, we will use the term "privileges and immunities" to apply only to national citizenship rights. The debate, discussed *infra*, centered on the question of whether "equal protection" was a federal right separate from, although dependent on, state created rights.

every speaker, and probably by almost every congressman, that rights of national citizenship, including those associated with the first amendment, were personal rights belonging to every citizen which could be enforced by the federal government against private parties irrespective of the actions of states.

One example of this distinction is found in the very speech by Representative Garfield upon which Petitioners place so much reliance. Garfield carefully distinguishes between the privileges and immunities of national citizenship and the privileges and immunities of state citizenship. GLOBE App. p. 152-53. He finds guarantees of life, liberty, and property to be attributes of state citizenship which cannot be addressed by the federal government, absent some evidence of state nonfeasance. However, as to the attributes of national citizenship, he states that, "it is undoubtedly within the power of Congress to provide by law for the punishment of all persons, official or private, who shall invade these rights, and who by violence, threats, or intimidation shall deprive any citizen of their fullest enjoyment." GLOBE, App., p. 153. He quotes in full, and with approval, § 6 of the Act of May 21, 1870, which he supported.[18] Garfield had no argument with the bill so far as it protected rights which did not depend upon the states for their creation.

This distinction appears to have been critical to all of the moderate Republicans. There is no other way to harmonize their support of § 6 of the 1870 Act with their partial opposition to § 1985(3) before amendment. For

18. This section is a criminal provision which, for all practical purposes, duplicates the language of § 1985(3) but omits any reference to equal protection, and hence to rights derived from the states. The Act is codified at 18 U.S.C. § 241.

example, Representatives Wilson of Indiana states emphatically that the privileges and immunities of American citizens are citizenship rights, and not mere limitations on the states. He has no difficulty with providing a civil federal remedy for their violation by private persons. Only then does he turn to the question of equal protection. Here, in the passage cited by the Petitioners, he feels the need for some form of state involvement. GLOBE, pp. 481-83. Indeed, Wilson has no quarrel at all with § 2 of the Act. The remarks quoted by Petitioners refer to § 3. Senator Frelinghausen similarly notes the distinction between federal and state citizenship. He sees no problem with congressional enforcement of the fundamental privileges and immunities of national citizenship. His difficulties are with the bill as it relates to usurpation of state criminal jurisdiction. GLOBE, pp. 499-502. (*See also* sentiments of Representative Pratt, GLOBE, pp. 505-06.)

Perhaps the clearest exposition of the distinction is found in the speech of Representative Cook. GLOBE, pp. 485-86. Petitioners correctly state that Cook expressed the view that the original draft of § 2 "went too far in legislating on matters within the exclusive province of the states". What Petitioners fail to state is that Cook and others expressing similar sentiments, did not regard the privileges and immunities of citizens as state matters. On the contrary, Cook states that Congress may protect every right secured by the Constitution and "any act which obstructs the operation of the Constitution of the United States so far as it affects his right, is within the constitutional power of Congress to remedy." GLOBE, p. 485. Somewhat later in the debates, he remarked that any conspiracy against a federal right is a federal prob-

lem. GLOBE, p. 511. Cook's objection went to congressional attempts to regulate the protection of life and property or to punish violations of state law, both of which he regarded as within the states' primary jurisdiction. GLOBE, pp. 485-86. Similarly, Representative Burchard's objection before amendment was that congressional power could not reach into the states to punish robbery, mayhem, etc. He had no objection to federal jurisdiction to protect federal rights. GLOBE App., pp. 313-14. *See also*, GLOBE, pp. 575-77 (Sen. Trumball); GLOBE App. p. 251 (Sen. Morton); GLOBE, p. 822 (Sen. Thurman). Almost all Republicans, moderates and radicals alike, were agreed that Congress had power to create a civil remedy for private violations of national privileges and immunities.

It must be emphasized that there was no attempt to distinguish between state action as an element of the cause of action, and state action as an element of a constitutional violation.[19] It was assumed that the privileges and immunities of national citizenship were personal guarantees which could be violated by private parties as well as the state. *See, e.g.*, GLOBE, p. 448 (Rep. Butler); GLOBE, p. 481 (Rep. Wilson); GLOBE, p. 486 (Rep. Cook); GLOBE, App. p. 46 (Rep. Kerr); GLOBE, p. 505 (Rep. Pratt). Their reasoning was that the privileges and immunities of national citizenship were granted by the first clause of the fourteenth amendment which granted

19. The legislative history does not support Petitioners' distinction between private conspiracies interfering with rights protected by the fourteenth amendment and those interfering with other rights. The legislators thought that the whole purpose of the Act was to protect rights created by the fourteenth amendment, with, as *Griffin* held, some sections addressed to state action and others to private action.

national citizenship. The granting of national citizenship necessarily granted the privileges and immunities of that citizenship, which could be protected against all the world by federal legislation. GLOBE, pp. 375-76 (Rep. Lowe); GLOBE, p. 499-500 (Sen. Frelinghausen); GLOBE, pp. 691-692 (Sen. Edmunds); GLOBE, App. p. 85 (Rep. Bingham). The privileges and immunities referred to were not created by the prohibitory clause of § 1 of the fourteenth amendment, but were derived from fundamental or prior law. GLOBE, p. 692 (Sen. Edmunds); GLOBE, p. 370 (Rep. Monroe). Thus, at least with regard to *national* privileges and immunities, there is no basis for Petitioners' purported distinction between the ability to reach private action, and state action as an element of a constitutional violation.

2. Equal Protection

Conspiracies to deprive persons of the equal protection of the laws presented different problems. This was the essence of Representative Garfield's objection. Garfield felt that § 1 of the fourteenth amendment only affected national citizenship by clearing up residual doubts created by *Dred Scott v. Sandford*, 60 U.S. 393 (1857). He felt that basic federal rights had always been part of the privileges and immunities of national citizenship, and thus enforceable against private parties. His objection related to equal protection or to the protection of privileges or immunities relating to personal and property rights. These he regarded as state created rights.

Two approaches were taken to this problem. The radicals did not believe a problem existed. *See, e.g.*, GLOBE, App., pp. 251-53 (Rep. Morton); GLOBE, p. 568 (Sen.

Edmunds); GLOBE, App., pp. 82-86) (Rep. Bingham); GLOBE App., p. 141 (Rep. Shanks). The moderate minority believed some form of state involvement was required. However, even this small group was far from homogeneous. Their opinions on the requisite level of state involvement ran the entire spectrum of possible views: insistence on formal legislative enactment in order to satisfy the fourteenth amendment, GLOBE, App. 208 (Rep. Blair); systematic neglect or malfeasance, GLOBE, p. 459 (Rep. Coburn); a simple "lack of power or inclination", GLOBE, p. 428 (Rep. Beatty); a mere failure to act on the part of the state, GLOBE, p. 482-83 (Rep. Wilson); GLOBE, p. 501 (Sen. Frelinghausen); or even lack of success in fulfilling an affirmative duty to act to promote personal liberties, GLOBE, p. 335 (Rep. Hoar); GLOBE, p. 429 (Rep. Beatty). Indeed, several legislators felt that the "state" for equal protection purposes would include the community. Thus the citizenry could deny equal protection by conspiracies. GLOBE, App. p. 182 (Rep. Mercur); GLOBE, App. p. 80 (Rep. Perry).

The alternative, and far more consistent view of the bill was that it should punish not private violence, but rather animus in relation to federal rights. This was clearly the view of Representative Shellabarger, who not only sponsored the bill, but introduced the amendment:

> The object of the amendment is . . . to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the *animus* in effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section.

GLOBE, p. 478 (Rep. Shellabarger). Earlier in the debates, when Representative Hawley objected that the original version of § 2 addressed itself to state crimes, Shellabarger responded that the crime itself was not to be punished, but that the bill was aimed at the conspiracy as it related to federal rights and was therefore clearly within federal jurisdiction. Thus, it was stressed that the crimes involved were not ordinary crimes but those organized and motivated by an animus directed at rights of national citizenship. GLOBE, pp. 412-14 (Rep. Roberts); GLOBE, App. p. 79 (Rep. Perry). This position seems to have been the essence of the compromise amendment. Where the animus was directed against *equal enjoyment* of the rights of persons and property, a federal matter of equal protection was established.

This is precisely the view taken by this Court in *Griffin* after a lengthy discussion of this same legislative history. 403 U.S. at 98-102. As *Griffin* held, the compromise was that "the conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." 403 U.S. at 102 (footnote omitted). Thus *Griffin* correctly presents the legislative intent. The radicals gave up direct federal protection of life and property. The moderates gave up their insistence on state action. A fair synthesis of the compromise position is precisely that stated in *Griffin*. The Act is directed against a certain kind of conspiracy, one motivated by a "class-based, invidiously discriminatory animus." *Id.* A conspiracy, in other words, which acts on the principle that one group is inherently less deserving than another—this is the essence of "equal" protection. *Harris v. McRae*, 448 U.S. 297, 324 (1981).

B. "Associational Rights in a Commercial Context Were Close to the Core of the Coverage Intended by Congress"

Petitioners cannot seriously question that association was considered part of the privileges and immunities of citizenship. If there is one principle in the history of the Ku Klux Klan Act which is undisputed, it is the desire of Congress to put down the violence of the Klan. Almost every legislator who addressed the topic insisted that some action was necessary to put down violent *private* conspiracies and to promote and protect the association and expression of Republicans in the South. *See, e.g.*, GLOBE, p. 484 (Rep. Wilson); GLOBE, p. 487 (Rep. Tyner); GLOBE, pp. 658-59 (Sen. Stewart); GLOBE, p. 157 (Sen. Sherman); GLOBE, p. 517 (Rep. Shellabarger); GLOBE, p. 686 (Sen. Shurz); GLOBE, p. 412-13 (Rep. Roberts); GLOBE, p. 394 (Rep. Rainey); GLOBE, p. 457 (Rep. Coburn); GLOBE, p. 438 (Rep. Cobb); GLOBE, p. 441 (Rep. Butler); GLOBE, p. 375-76 (Rep. Lowe); GLOBE, p. 504 (Sen. Pratt).

The Republicans in need of congressional protection fell into two general classes: blacks and northern white immigrants. As a result, two subsidiary types of animus were considered by Congress: race and economic animus. The independent significance of race in the passage of the Ku Klux Klan Act is widely understood. The importance of the Act for economic groups is equally clear in this historical context and, like race, economic animus has independent significance. White northern immigrants, like the civil rights workers in *Griffin*, were regarded as troublemakers coming into the territory to take over local institutions, both politically and economically. Represen-

tative Swann and other opponents felt the real issue was that of northern carpetbaggers, and the race issue was merely a front for northern domination. GLOBE, p. 363. *See also*, GLOBE, pp. 354-55 (Rep. Beck); GLOBE, p. 364 (Rep. Arthur); GLOBE, p. 599 (Sen. Saulsbury).

Proponents of the bill stressed the need to protect "men who have gone to the South from other States in the lawful harmless pursuit of their proper vocations." GLOBE, p. 653 (Sen. Osborne). Senator Ames observed that:

> [e]very large center in the country has become crowded with men whose experience during the war taught them they could by changing their locations better their conditions. This has been invited in every section but the South, where, alas! "carpet-baggers" disturb what remains of that peculiar in-situation, slavery.

GLOBE, p. 570. Representative Kelley deplored

> the madness of the southern Democracy as exhibited in their treatment of the freed men and of northern and other immigrants, and in permitting secret armed societies to intimidate capital and enterprise, and constrain them to remain without her borders or to flee from them after having had the temerity to enter.

GLOBE, p. 338.

Some legislators attempted to convince their southern colleagues that protection of carpetbaggers was desirable because such persons provided capital and organized labor for the rebuilding of the South. GLOBE, App. pp. 251-53 (Rep. Morton); GLOBE, p. 609 (Sen. Poole); GLOBE,

p. 338 (Rep. Kelley). In short, a prime concern in the legislative debates was the protection of the right of "outsiders" to migrate to southern states and do business. GLOBE, p. 368 (Rep. Sheldon); GLOBE, pp. 498-500 (Sen. Frelinghausen).[20] Considering the number of southern congressmen who were themselves recent immigrants, having gone to the South after the war to seek their fortunes, it is not surprising that this was an important concern of the 42nd Congress.

CONCLUSION

Legislative history is a matter to be resorted to only when a statute is ambiguous. The only ambiguity in § 1985(3) relates to the definition of private "equal" protection or "equal" privileges and immunities. This was resolved in *Griffin* by defining those terms as involving a general intent to further a class-based invidiously discriminatory animus. 403 U.S. at 102. Such ambiguity as remains after *Griffin* is surely not of a magnitude to require the kind of analysis engaged in by Petitioners, especially when that analysis substantially misapprehends the legislative history. There is no basis for overruling this Court's clear and persuasive interpretation of the statute in *Griffin v. Breckenridge*.

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20. Interestingly, Senator Frelinghausen specifically mentions craft workers: "the mason or the carpenter of New Jersey may put his chisels or his trowels in his carpet-bag, and go to any part of the land, and say, 'here I will stay in despite of the holy horror of those who cry out, "adventurer!" "scalawag!" "carpetbagger!"'" GLOBE, p. 500.

The Circuit Court correctly applied the principles of a § 1985(3) cause of action as defined in *Griffin* based upon the factual findings of the District Court as to the requisite animus.

For the reasons stated above, the judgment of the Fifth Circuit Court of Appeals *en banc* must be affirmed.

Respectfully submitted,

ROBERT Q. KEITH

PROOF OF SERVICE

CERTIFICATE BY BAR MEMBER

I, Robert Q. Keith, attorney of record for Paul E. Scott, James T. Matthews, A.A. Cross, and A.A. Cross Construction Company, Inc., Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 18th day of March, 1983, I served copies of the foregoing Brief for Respondents on Petitioners hereto, as follows: on the United Brotherhood of Carpenters and Joiners of America, Local 610 (AFL-CIO), United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 195 (AFL-CIO), and the United Brotherhood of Carpenter and Joiners of America, Local 753 (AFL-CIO), Petitioners, by placing a copy in the United States mail, addressed to their attorney of record as follows:

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No. 82-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 610 (AFL-CIO), *et al.*,
Petitioners,

v.

PAUL E. SCOTT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. RESPONDENTS HAVE NOT BEEN DEPRIVED OF ANY RIGHT ACTIONABLE UNDER 42 U.S.C. § 1985(3).

A. We, of course, agree with respondents that *Griffin v. Breckenridge*, 403 U.S. 88, the leading modern case interpreting 42 U.S.C. § 1985(3) was correctly decided.[1] (Resp. Br. 9-11.)[2] Respondents err fundamentally, however, when they assert that "*Griffin* Does Not Support Petitioners' Assertion of a State Action Requirement." (Resp. Br. 11, Heading.) The correct reading of *Griffin* in this respect is that of Justice Stevens concurring in *Great American Fed. S. & L. Assn. v. Novotny*, 442 U.S. 368, 381-385 (*Novotny*), and in *Dombrowski v. Dowling*, 459 F.2d 190 (C.A. 7) (*Dombrowski*). (See Pet. Br. 38-39 and 43-44.)

Respondents attempt to escape the force of those opinions by asserting: "These decisions involved allegations falling within *Griffin's* element (4b)—deprivation of a 'right or privilege of a citizen of the United States.'" (Resp. Br. 20.) This argument overlooks *Dombrowski's* pervasive discussion of "discrimination" and "equal protection of the law," which are at the heart of elements (2a) and (2b) as described in *Griffin*, but are not part of element (4b), to which respondents would confine the

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[1] We agree too that the coverage of § 1985(3) and the constitutionality of its application are separate questions. We hasten to add that since the purpose of § 1985(3) is to provide a federal cause of action enforcing the Reconstruction Amendments as the legislation's sponsors understood those Amendments (see, *e.g.*, Rep. Garfield's speech quoted at Pet. Br. 20-26) the statute cannot properly be given a scope beyond those Amendments. (See the principal dissent below, App. A-47 to A-48).

[2] Resp. Br. will refer to the Brief for Respondents herein; Pet. Br. will refer to the Brief for Petitioners; App. will refer to the separately bound Appendix to the Petition for Writ of Certiorari herein, which reproduces the opinions below.

Dombrowski decision.[3] Moreover, after noting that because "plaintiff is white and claims no abridgement of his constitutional right to travel, the holding of *Griffin* does not control this case" (459 F.2d at 195), the *Dombrowski* opinion observed that the *Griffin* Court:

> expressly noted that it was not deciding "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under § 1985(3)." Thus, the Court did not have occasion to consider the effect of the statute on private conspiracies designed to deprive the plaintiff of rights protected by the Fourteenth Amendment. [459 F.2d at 195, quoting 403 U.S. at 102, which discussed the motivational element (2a) and (2b) delineated in *Griffin*.]

There is a further conclusive objection to respondents' interpretation of *Dombrowski*. If, as they say, Mr. Dombrowski's § 1985(3) case failed because of noncompliance with *Griffin's* element (4b), the Seventh Circuit would have had to face the issue whether the denial to the plaintiff of an opportunity to rent an office constituted an injury to his person or property within element (4a). This question was not reached because due to the absence of state action (and of a constitutional right, like that in *Griffin*, which directly protects private persons), no violation of element (2a) or (2b) had been established.

Respondents themselves recognize that if *Griffin's* elements (1)-(3) are satisfied the plaintiff prevails if either element (4a) or (4b) is satisfied. It is on this basis that they attempt to put aside *Novotny*, asserting that "the plaintiff in *Novotny* suffered no injury to person or property that would bring this section 1985(3) action within (4b)." (Resp. Br. 21). But this assertion is untenable because the harm suffered by Mr. Novotny was termination from his job, clearly an injury to his property. (See

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[3] See, *e.g.*, 459 F.2d at 191 stating the issue under § 1985(3); *id.* at 192-193, describing the holding of the district court which was being reviewed; and *id.* at 196 stating the critical conclusion.

442 U.S. at 368-370; see also *id.* at 385 (Stevens, J., concurring).) Therefore, the claim in *Novotny*, too, failed because no illegal "purpose" within *Griffin's* elements (2a) or (2b) had been established, rather than as respondents argue, because no element (4b) injury had been shown.

B. It is objected at Resp. Br. 11 that we do not explain "precisely what form of state involvement is required". Such a discussion would have been an entirely academic commentary on an issue which has frequently divided the Court since respondents have demonstrated no state involvement of any kind.[4] That being so, plaintiffs' claim of illegal interference with their constitutional freedom of association founders on the principle that "most rights secured by the Constitution are protected only against infringement by governments" (*Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 156; *Lugar v. Edmonson Oil Co.*, —— U.S. ——, 50 L.W. 4850, 4853 (June 25, 1982).)[5]

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[4] *Amicus Curiae* Legal Foundation of America (LFA) attempts to overcome this fatal deficiency in the plaintiffs' claim by (a) comparing this case to *Marsh v. Alabama*, 326 U.S. 501 and (b) asserting that any union action is state action. As to the latter point, LFA has overlooked not only the squarely contrary holding of *Steelworkers v. Sadlowski*, —— U.S. ——, 50 L.W. 4626, 4631, n. 16 (June 14, 1982); and *Steelworkers v. Weber*, 443 U.S. 193, 200 (see also *Communications Assn. v. Douds*, 339 U.S. 382, 402), but also the requirement of a nexus between the state and the conduct of the private entity which is sought to be treated as the state. (See, *e.g.*, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-351.) As for *Marsh*, while the title to the town of Chickasaw Alabama was held by a private corporation whose employee was the town policeman (see 326 U.S. at 502), neither the defendant unions nor all the unions together exercised governmental authority in Port Arthur, Texas. LFA Br. 17 and Resp. Br. 28, n. 11, refer to testimony given at an *ex parte* hearing. That testimony does refer to the difficulty of controlling individual acts of violence *"away from the job site"* but does not suggest that the law enforcement authorities were unable to deal with the violence which was the subject of the present lawsuit. In fact, some of the perpetrators of that violence were apprehended, tried, convicted and imprisoned.

[5] Contrary to LFA's understanding (LFA Br. 8-9) the state action requirement depends on the constitutional source of the right

C. The absence of state action aside, plaintiffs have not established a denial of "equal privileges and immunities under the laws" because they have not established a violation of their First and Fourteenth Amendment rights. It bears reiteration that many of those at the job site were union members and that most resided in the immediate area or in nearby Beaumont or Houston. (See the Appendix to this Brief at pp. 1a to 2a). Thus, the First Amendment claim here depends on the *en banc* court of appeals majority's theory that "merely working for a nonunion employer [does] qualify for constitutional protection." (App. A-12). We demonstrated to the contrary at Pet. Br. 44-47 with special reliance on *Smith v. Arkansas State & Highway Employees*, 441 U.S. 463.

In attempting to distinguish *Smith*, respondents confuse the nature of the right asserted with the means of depriving the plaintiff of that right.[6] The latter is simply not relevant for determining whether a right is protected by the First Amendment.[7] And while respondents assert that the "actual relevance of the *Smith* opinion to this case lies in its recognition that first amendment associational rights would be impaired by efforts to hinder

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asserted, rather than on its importance. Thus, as the Court said of a cognate First and Fourteenth Amendment right: "It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state." (*Hudgens v. NLRB*, 424 U.S. 507, 513). So, too, the rights of "commercial association" (Chamber of Commerce Br. 23) and "to earn and pursue a livelihood and to enter into and conform contracts * * *" (National Right to Work, etc. Br. p. 7) are, to the extent that they have any constitutional basis, also subject to the state action principle, as the very cases cited *id.* illustrate.

[6] "That the defendant did not violate plaintiffs' first amendment rights in *Smith* by simply ignoring plaintiffs is hardly relevant to the situation of mob violence in the present case." (Resp. Br. 24-25).

[7] The *means* of deprivation (that is the defendants' *conduct*, as opposed to the defendants' "purpose") are relevant under § 1985(3) only with respect to the first element of a claim which is not at issue here. (See *Griffin*, 403 U.S. at 102-103.)

workers from 'joining together in a union, or from persuading others to do so, or from advocating any particular ideas'" (Resp. Br. 25, quoting 441 U.S. at 465), that argument is unavailing because respondents have failed to prove the existence of such "efforts."

D. *Griffin* left open the question "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3) before us". (403 U.S. at 102 n.9.) Respondents contribute nothing to the answer to that question. In their discussion of "Motivation-Element (2)" (Resp. Br. 15-19) it is stated that "the necessary motivation is present when the animus behind the conspiractors' actions is ir[illegible]us and discriminatory" (*id.* at 15) and that the "equal protection moiety of § 1985(3) * * * becomes operational when violence is directed against persons because of their perceived membership in a group" (*id.* at 17). Aside from these remarks that discussion does not even purport to specify the content of, or any limitation on, the class-based animus concept.

Respondents do further elaborate their view of the class-based animus concept at pp. 26-31 of their brief. That discussion proceeds from the premise that "[a]ny class is appropriate so long as plaintiffs can prove the requisite invidiously discriminatory animus." (Resp. Br. at 26.) Respondents then quote approvingly the statement of the *en banc* court of appeals majority, "those who would exercise a false territorial sovereignty by formenting hostility against persons antagonistic to their aims *create a class* in need of federal protection of precisely the sort Congress intended to protect." (Resp. Br. at 26-27; respondents' emphasis.) Except where the conspiracy is entirely mindless, tortious actions taken against a group of persons always "create a class" in this sense of that term—the class of those at whom the tort is aimed. In practical terms then, respondents and the *en banc* court of appeals majority *do* read § 1985(3) as creating a general federal

tort law. (See the principal dissent below, A-44 to A-45, A-48 to A-49.)

II. RESPONDENTS' DESCRIPTION OF THE LEGISLATIVE MATERIALS IS WHOLLY MISLEADING.

Respondents' analysis of the legislative history (Resp. Br. 35-44) is, as we understand that analysis, designed to prove: (A) that the debates on the 1871 Act are grounded on a distinction between "equal protection of the laws" as to which the necessity of requiring a state action showing was controversial and "equal privileges and immunities" as to which it is said all agreed that no state action showing is required (Resp. Br. 35); and (B) that "Associational Rights In A Commercial Context Were Close To The Core Of The Coverage Of [§ 1985(3)] Intended By Congress" (Resp. Br. 42; Heading). We show now that the very legislative materials cited by respondents belie rather than support each of respondents' contentions.

"Privileges And Immunities" (Resp. Br. 35-39.)

1. Respondents make much of the fact that Rep. Garfield quoted from Section 6 of the Enforcement Act of May 21, 1870 during the debate on the 1871 Act and that Rep. Garfield had supported the 1870 Enforcement Act. Respondents are not the first to have raised this point, Rep. Shellabarger raised the same objection (Cong. Globe, 42d Cong., 1st Sess. App. 153-154 (1871) (hereinafter "Globe")), and Rep. Garfield responded:

> If the case stands in all respects exactly as my colleague puts it, it might push me to the conclusion that some of the provisions of the enforcement act are unconstitutional; * * *.
>
> * * * *
>
> But I call my colleague's attention to the peculiar language of the fifteenth amendment. It is not, as his remarks imply, a mere prohibition to the State, a simple negation of power. It is a double prohibition, reaching, in terms, both the State and the United States. * * *

This double prohibition Congress may enforce. [Globe App. 154.]

This was the same point made by Sen. Pool in introducing § 6 of the 1870 Enforcement Act:

> The fifteenth amendment to the Constitution of the United States provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State on account of race, color, or previous condition of servitude. . . . But the word "deny" is used. There are various ways in which a State may prevent the full operation of this constitutional amendment. It cannot—because the courts would prevent it—by positive legislation, but by acts of omission it may practically deny the right. *The legislation of Congress must be to supply acts of omission on the part of the States.* If a State shall not enforce its laws by which private individuals shall be prevented by force from contravening the rights of the citizen under the amendment, it is in my judgment the duty of the United States Government to supply that omission, and by its own laws and by its own courts to go into the States for the purpose of giving the amendment vitality there.
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> • • •
>
> There [in the fourteenth amendment] the word "deny" is used again; it is used in contradistinction to the first clause, which says, "No State shall make or enforce any law" which shall do so and so. That would be a positive act which would contravene the right of a citizen; but to say that it shall not deny to any person the equal protection of the law it seems to me opens up a different branch of the subject. *It shall not deny by acts of omission, by a failure to prevent its own citizens from depriving by force any of their fellow-citizens of these rights.* [Cong. Globe, 41st Cong. 2d Sess., p. 3611 (1870); emphasis added.]

2. Rep. Wilson's discussion of privileges and immunities occurs in the portion of his remarks concerning § 1

of the 1871 Act—the provision dealing with conduct under color of state law—and hence is entirely irrelevant in determining the meaning of § 2. (See Globe 481-482.)

3. We agree that Sen. Frelinghuysen's comments, cited by respondents, warrant close scrutiny, for he said of the Fourteenth Amendment:

> This amendment specifies life, liberty, and property as among the privileges of the citizen of the United States, and provides "that no State shall deny to any person within its jurisdiction the equal protection of the laws." A State denies equal protection whenever it fails to give it. Denying includes inaction as well as action. A State denies protection as effectually by not executing as by not making laws. *The amendment says a State is not to abridge the privileges and immunities by making or enforcing any laws, and it is denying protection by failing to make or by failing to enforce proper laws.*
>
> * * * *
>
> The Federal Government should only interfere to protect the citizen of the United States in his privileges when the State clearly and persistently fails to do so. [Globe 501; emphasis added.]

4. Respondents cite as background the "sentiments of [Sen.] Pratt" expressed in a speech immediately following Sen. Frelinghuysen's. In that speech Sen. Pratt said:

> We cannot reach by law the grand jury which refuses to indict these criminals, nor can we punish the petit jury which refuses to convict. *The State officers, the constables and sheriffs, who refuse to do their duty are beyond our reach.* We cannot touch any State official for malfeasance, or misfeasance, or non-feasance; *but we can say to all these unprofitable servants, to all the civil agencies in the States, "Your failure is our occasion and opportunity. We will describe and punish as crimes against the United States that class of offenses*

> *against citizenship which you fail to punish.* If in doing this we seem to invade the reserved rights of the States in punishing riots, arsons, robberies, and murders committed in your midst by organized bands of ruffians, it is because they have been committed against citizens of the United States *in violation of rights secured by the national Constitution*, and because you wholly fail to prevent and punish them. You have brought this necessity upon yourselves by refusing to obey a plain constitutional duty not to withhold from any one the equal protection of your laws. You have omitted this duty habitually where the friends of the Government were concerned. The record of a conviction does not exist in your midst where you have punished a member of this order of outlaws. [Globe 506, emphasis added.]

5. Rep. Cook, say respondents, provided "[p]erhaps the clearest exposition" on priviliges and immunities. After the passage already quoted at Pet. Br. 28 Rep. Cook went on to give three examples of interference with federal rights that could be redressed by federal law: interference with certification of a case to the Supreme Court of the United States to prevent assertion of a federal constitutional right, interference with federal elections, and interference with proceedings in a federal court. (Globe 486.) However, as this Court has recently explained, the 1871 Act treats very differently the sort of activity described by Rep. Cook and the sort of activity that falls within the sections of the Act under consideration in this case. (See *Kush* v. *Rutledge*, —— U.S. ——, 51 L.W. 4356, 4358 (April 4, 1983).)

While, to borrow the *Kush* opinion's words, Rep. Cook believed that Congress had authority to legislate with respect to "activity that is * * * institutionally linked to federal interests," he did not believe that Congress had authority to reach activity, "that is usually of primary state concern," unless the states were unwilling or un-

able to protect those rights. (See Globe 485 (dialogue with Rep. Eldridge) quoted Pet. Br. 28-29 n.5.)

6. The last paragraph of this section of respondents' argument contains scattered references to ten different speeches, but when those speeches are examined, it is seen that even the radical Republicans among those cited by respondents did not speak in terms broad enough to aid respondents. For example, Rep. Butler, on the page cited by respondents, like Rep. Garfield, grounded the 1871 Act in the failure of the southern states to afford protection for constitutional rights:

> All agree that the mere constitutional assertion of affirmative guarantees not made operative by law, are ineffectual to aid the citizen. How, then, can the citizen avail himself of those constitutional guarantees and affirmative declarations of his rights, if Congress cannot pass laws to make them operative? How can it be an interference with the rights of the States for the laws of the United States to afford that protection to its citizens which the State fails or neglects to do for itself? [Globe 448).][8]

"Equal Protection" (Resp. Br. 39-41.)

1. Respondents' equal protection discussion begins from the proposition that the moderate Republicans held a wide range of views as to what constitutes a denial of equal protection. In support of this assertion, respond-

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[8] Rep. Lowe, another sponsor of § 2 as originally drafted, spoke to the same effect on the pages cited by respondents. (Globe 375.) So did Rep. Monroe. (Globe 370.) We have already discussed the views of Representatives Wilson and Cook and Senators Pratt and Frelinghuysen, showing that their views were the same as those held by Rep. Garfield. Sen. Edmunds read the privileges and immunities clause as "a direct prohibition to the State" (Globe 696), and the equal protection clause as allowing federal protection where the states have failed to give equal protection (Globe 697). Rep. Bingham's views of the scope of the Fourteenth Amendment were expressly disapproved by Rep. Garfield (Globe App. 151) and cannot be deemed authoritative. Rep. Kerr was a Democratic opponent of the bill. (Globe App. 46-50.)

ents cite speeches by Representatives Coburn, Beatty, Wilson, and Hoar and by Senator Frelinghuysen. But all of these Republicans agreed with Rep. Garfield's views quoted at Pet. Br. 25 that the justification for § 2 of the 1871 Act is that a state denies equal protection of the laws by failing or refusing to enforce those laws. Rep. Blair, also cited by respondents, was not a moderate Republican and was an opponent of the 1871 Act.

2. Respondents characterize speeches by Representatives Mercur and Perry as arguing that for equal protection purposes the "state" includes the general community. However, both of these Representatives made it clear that they were speaking of the "people, in the administration of their government, act[ing] mostly through the legislative, judicial and executive branches of their creation," (Globe App. 182, Rep. Mercur), and "the people of a State, with more or less definite political and governmental relations," (Globe App. 80, Rep. Perry). They were discussing the community organized into a governmental body, and not, as respondents would imply, some informal social group.

3. Respondents conclude by citing two speeches given before Rep. Garfield raised his objections to § 2 as introduced and before the compromise amendment to § 2 was accepted. Neither of the speeches supports, or even pertains to, the point made by respondents.

"Associational Rights In A Commercial Context" (Resp. Br. 42-44.)

Respondents assert that, "The Republicans in need of congressional protection fell into two general classes: blacks and northern white immigrants. As a result, two subsidiary types of animus were considered by Congress: race and economic animus." (Resp. Br. 42.)

(a) To show that the assertion that the 1871 Act is aimed at conspiracies motivated by "economic animus" is wrong, we need go no further than the passages from the legislative history cited by respondents.

1. Respondents rely primarily on statements by three northern Congressmen and by one northern Senator, all *Democratic opponents of the bill*, to the effect that the real issue in the South was not race but rather domination of the South by northern carpetbaggers.

2. Rep. Wilson, on the page cited by respondents, had this to say:

> What is the purpose of murdering poor and defenseless negroes? *Is it for gain or "the base aims of individual offenders?" No.* What is the purpose of driving officers from their places? Is it for gain or the "base aims of individual offenders?" No. It is to get rid of votes, to get possession of local and State governments. [Globe 484; emphasis added.]

3. Rep. Tyner, also on the page cited by respondents, more directly refuted the Democrats' argument:

> No matter, sir, how generous and magnanimous the terms on which they were restored to citizenship, they are rebellious still in spirit only because they are compelled *to become the political equals of those who were formerly their slaves.* It is not in denying to certain of the leaders of the late rebellion the right to hold office, but in the extension of political privileges to colored men, whereby power has departed from its former possessors, that we find an intelligent explanation of their conduct now. *Rescind the last three great amendments to the Constitution and thus revive slavery and the domination of the slave power, and no voice of complaint will come to us from the men whose lawless acts require suppression by the power of the General Government.* [Globe 487; emphasis added.]

4. Rep. Roberts gave the example of a native southerner and officeholder of long term in South Carolina who suffered violence at the hands of the Klan, and after noting that blacks and northerners were not the only victims of violence, stated:

> But one rule never fails: the victims whose property is destroyed, whose persons are mutilated,

> whose lives are sacrificed, are always Republicans. They may be black or white; they include those who wore the blue and those who wore the gray; newcomers and life-long residents, but only Republicans. *Stain the door lintels with the mark of opposition to reconstruction and of hostility to the national Administration, and the destroying angel passes by.* [Globe 413; emphasis added.]

5. Sen. Pratt explained that the Klan violence was rooted in the Civil War and in the resentment of the former slaveowners over the emancipation of their former slaves.

> Mr. President, these acts are the development of the rebel spirit still alive in the South. They are the outcroppings of that hate which sought to destroy the Union; which laid hold of the pillars of State and sought to pull down the political fabric. Conquered upon the field, the defeated rebels and their sons still wage war against the friends of the Government under a new system of tactics, which paralyzes law, and which must drive them into exile or into the surrender of their opinions and to fellowship with the Democratic party. [Globe 504.]

In short, each of the speeches cited by respondents actually supports our original submission—that "[t]he point of the 1871 Act was to provide redress for the victims of the contemporaneous conspiratorial activities of the Ku Klux Klan: the Freedmen and those who made common cause with the Freedmen" (Pet. Br. 41).

(b) Respondents' attempt to show that the 1871 Act is aimed at conspiracies motivated by an animus against "immigrants" from other areas is equally flawed.

1. Respondents quote part of a sentence by Sen. Osborn as evidence that the bill's proponents stressed the need to protect, "men who have gone to the south" in "pursuit of their proper vocations." (Resp. Br. 43.) The entire passage reads as follows:

> My associates on this floor from the more northern States have no adequate appreciation of the circumstances under which loyal men in many parts of the South are living. Men who passed through our late war fearlessly meeting an open, avowed enemy, men who have gone to the South from other States in the lawful and harmless pursuit of their proper vocations, industrious emigrants from the european States, *white men who were born at the South and whose fathers and grandfathers were born before them, colored men who have received but cannot peacefully enjoy the rights of citizens of this Republic—all men, irrespective of race, origin, or color, so soon as they presume, in exercise of the rights guaranteed them in the Federal Constitution, to vote or hold an office contrary to the opinion of a political party, are continually in imminent peril* for property, person, and life, and are denied equal justice in the courts. [Globe 653-654; emphasis added.]

2. The very passage quoted from Sen. Ames shows that he found the hostility to "carpetbaggers" to be based on their opposition to slavery. (Globe 569-570.)

3. The passage excerpted from a speech by Rep. Kelly makes it appear as though he thought one of the Klan's purposes to be to drive out northern capital and enterprise. However, Rep. Kelly's point becomes clearer when the next sentence in the paragraph is set forth:

> I ask gentlemen on the other side of the House whether the proposition is true, as to any considerable part of the South, that a northern man can take his capital, his family, and his skilled workmen with him, and, having established himself quietly, identify himself with the Republican party, and still live undisturbed and unharmed. [Globe 338.]

(c) Following their series of carefully selected excerpts, respondents conclude with two sets of citations to the debates intended to support two slightly different points.

First, respondents assert that some legislators tried to convince their southern colleagues that it would be to the South's advantage to protect "carpetbaggers" who would provide the region with capital and labor. Respondents cite Sen. Morton's speech given before the Senate took up the House-passed bill (H.R. 320). Sen. Morton did note that the reign of terror in the South deprived that region of capital and immigration but the point of his speech was that it was blacks and white Republicans who were denied protection (see Globe App. 251-252.)

Sen. Pool stated that peace was needed so that through industry the Nation could repair its losses from the war. But he said this only to warn that if the Klan violence and its evasion of state authority did not stop more extreme measures would have to be taken against the South. (Globe 609.) And earlier in the speech cited by respondents, Sen. Pool made clear that he did not believe that it was the fact of immigration that drew the Klan's ire:

> The truth is that whenever a northern man, who goes into a southern State, will prove a traitor to the principles which he entertained at home, when he will lend himself to the purposes of the Democracy or be purchased by them, they forget that he is a carpet-bagger and are ready to use him and elevate him to any office within their gift. [Globe 607.]

Second, respondents' statement that a "prime concern in the legislative debates was the protection of the right of 'outsiders' to migrate to southern states and do business," (Resp. Br. 44) purports to have a basis in a speech by Rep. Sheldon early in the House debate and a speech by Sen. Frelinghuysen before the Senate took up H.R. 320.

Rep. Sheldon noted the possibility of local prejudices, but he certainly did not understand these prejudices to be directed particularly against "outsiders", and he explained the violence on the South not as rooted in sectional prejudice but as follows:

> The white people of the South are most strongly prejudiced against the colored people. Not so much, however, against them for their color as for their previous condition. *The sudden and radical change which has made the slave a coequal citizen* does not commend itself so readily to the mind of the former slaveholder as to those of us who were reared and educated under other circumstances. [Globe 369; emphasis added.]

(d) Respondents characterize a reference by Sen. Frelinghuysen's to craft workers as "interesting" (Resp. Br. 44 n.20) and the Chamber of Commerce (at pp. 13-14 of its brief) quotes the same passage as evidence of an intent to protect northern workers. The court of appeals in this case rejected the argument that this passage evidenced a general intent to protect northern labor because the passage is an isolated reference to such an intent and because the hostility directed toward northerners was understood to be due to Reconstruction policies. (App. A-17 n.11.) In fact, the passage is not even an isolated statement of concern for northern labor as such; when placed in the context of the entire speech it is clear that Sen. Frelinghuysen was denouncing the doctrine of states' rights that previously had allowed the southern states to oppress free black workers from the north when they happened into southern territory. To place this statement in context, it is important to first consider the sentences that begin the paragraph in which the cited passage appears:

> And this is not all. The forty millions are not only by this amendment citizens of the United States, but are by virtue of it, and of it alone, and despite the laws or constitution of any State, also citizens of the State in which they reside. National and State citizenship now both depend on the Constitution of the United States; formerly both were dependent on the States. [Globe 500.]

It was because of the Fourteenth Amendment that the "journeyman cobbler of New England" could stand in

Charleston and other southern ports and declare, "Here I will settle in despite of the constitution and of the laws of these States; * * *." And when the following passage spoken just before that quoted by respondents, is considered, it is clear that the northern laborers who gained most by the Fourteenth Amendment were black northern laborers who prior to the Amendment were oppressed when they traveled to the South, not because they were *outsiders* but because they were *black*:

> It was, unquestionably, the right of a sovereign State to determine citizenship, and that authority determined against the citizenship of its inhabitant, and he had that character nowhere. The Supreme Court went so far as to declare, in the case of Scott *vs.* Sanford, that one might have all the rights and privileges of a citizen of a State and yet not be entitled to the rights and privileges of a citizen of another State. A mulatto man might be a citizen of Massachusetts but he was not a citizen of Virginia; and we know that when citizens of Massachusetts went to South Carolina they were imprisoned, and when Judge Hoar went to argue their cause he was mobbed. We know that the Supreme Court of the United States declared that four millions of native-born persons who paid taxes and were represented were not citizens. We know that the extreme State-rights doctrine denied all national citizenship, that this doctrine, modified and accepted, made United States citizenship dependent on State citizenship. Now comes the fourteenth amendment, and declares that all persons, no matter whether they are citizens of States or not, born or naturalized in the United States, shall be citizens of the United States. That is what this nation says, let the States say what they will; and it further adds that they shall be citizens of the State in which they reside. [Globe 500.][9]

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[9] These three examples of persons who suffered under the doctrine of states' rights, which allowed the southern states to strip northern citizens of their rights, all involvd black men—Dred Scott,

Thus, rather than describing the effect of proposed legislation, and he was not discussing the 1871 Act, Sen. Frelinghuysen was describing the effect of the Fourteenth Amendment and its destruction of the states rights doctrine which had justified southern oppression of even free northern blacks. This is a far cry from exhibiting an intent to protect northern labor through legislation, much less a showing of a "prime concern."

The Upshot.

In sum the legislative history cited by respondents in fact leads to the same conclusions this Court drew from the entire legislative history just last month:

> The Ku Klux Act, 17 Stat. 13, was enacted on April 20, 1871, less than a month after President Grant sent a dramatic message to Congress describing the breakdown of law and order in the Southern states. Cong. Globe, 42d Cong., 1st Sess. 236, 244 (1871). During the debates, supporters of the bill repeatedly described the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern states.
>
> * * * *
>
> It is clear from the legislative debates that, in the view of the Act's sponsors, the victims of Klan outrages were deprived of "equal protection of the laws" if the perpetrators systematically went unpunished. Proponents of the measure repeatedly argued that, given the ineffectiveness of state law enforcement and the individual's federal right to "equal protection of the laws," an independent federal remedy was necessary and Congress had the power to provide it. See *Monroe* v. *Pape*, 365 U.S. 167, 174 (1961). [*Briscoe* v. *Lahue*, —— U.S. —— 51 L.W. 4247, 4250 (March 7, 1983).]

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a mulatto citizen of Massachusetts, and the citizens of Massachusetts who Judge Hoar was sent to defend in South Carolina. The last example involved the Port of Charleston's holding of free black seamen from Massachusetts as security while their ship was in port. (S. Hoar, Autobiography of Seventy Years, Vol. 1, 24 (1903).)

III. RESPONDENT CROSS CO. IS NOT ENTITLED TO RELIEF UNDER 42 U.S.C. § 1985(3).

Respondents assert that the "statutory language leaves no doubt that the judgment of the court [below] is correct" in holding that respondent Cross Co. is entitled to relief even though that company is not in the protected class. A decision of this Court subsequent to our brief (but prior to that of respondents) demonstrates the inadequacy of this literalistic approach to standing.

In *Associated General Contractors of California v. California State Council of Carpenters*, —— U.S. ——, 51 L.W. 4139 (February 22, 1983) ("*AGC*"), the Court held that the plaintiff unions were not entitled to recover damages under § 4 of the Clayton Act for injuries allegedly suffered by them as a result of the defendants' violation of the antitrust laws. The bases of the respective damage claims in *AGC* and in this case are parallel. In *AGC* the antitrust conspiracy injured both the contractors and the unions, and injuring the latter was its purpose. In the present case, plaintiffs argued that the defendants' conduct (which is arguably actionable under § 1985(3)) caused direct injury to the individual plaintiffs and to Cross, and that the object was to damage Cross as a nonunion employer. Thus, in both instances, there is no question that (assuming a violation) one class of plaintiffs had a cause of action—the union contractors in *AGC*, and the individual plaintiffs in this case. But even as the unions were denied standing in *AGC*, so Cross should be denied standing in this case. The pertinent statutory language in *AGC*, that of § 4 of the Clayton Act, is—as the Court recognized in *AGC*—without limitation on its face. Nevertheless, relying heavily on "the contemporary legal context in which Congress acted * * *" (described at 51 L.W. 4143) in adopting § 4's Sherman Act antecedent, the Court refused to read § 4 literally.

There is no basis for attributing to the earlier 1871 Congress a more expansive approach to standing than *AGC* attributed to the Sherman Act Congress. Indeed,

this Court has recently reaffirmed, in construing § 1 of the 1871 Act (42 U.S.C. § 1983): "that the all-encompassing language of § 1983, referring to '[e]very person' who, under color of law, deprives another of federal constitutional or statutory rights, is not to be taken literally." (*Briscoe v. Lahue, supra*, 51 L.W. at 4238.)[10] Since the precedents leave the question open, persons outside the protected class should be denied § 1985(3) standing by a parity of reasoning with *AGC* because the granting of relief to the members of a protected class alone is sufficient to deter violations of § 1985(3) without unnecessarily expanding federal tort law.[11]

CONCLUSION

The judgment of the court of appeals should be reversed with directions to remand this cause to the district court for dismissal of the complaint.

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[10] In asserting that "*Griffin* clearly establishes" the absence of "any special standing limitation" (Resp. Br. 33), plaintiffs again misread that precedent, since the petitioners who rode in the car with R. G. Grady were themselves in the protected class. Thus it was not necessary to decide whether persons outside the protected class had standing to sue under § 1985(3). (See also Pet. Br. 48 discussing Justice Stewart's opinion for the Court in *Novotny*.)

[11] Respondents' reliance on *Sullivan v. Little Hunting Park*, 396 U.S. 229 and *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, is plainly misplaced. In *Sullivan* the white plaintiff was given standing not under a construction of 42 U.S.C. § 1982, but on the theory that a denial of standing would unconstitutionally sanction the denial of a contract to the black plaintiff contrary to *Barrows v. Jackson*, 346 U.S. 249, 259. (See 396 U.S. at 237). No issue of standing was presented in *Adickes, supra*, because Ms. Adickes, a white, sued to vindicate her own rights: (i) to be served in the company of Negroes; and (ii) not to be falsely arrested. (See 398 U.S. 147-148, 149-150.)

Respectfully submitted,

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APPENDIX

(Excerpts From Trial Transcript)

A. *Testimony of Plaintiff Paul Scott*

Q: Where do you live?

A: I live at 717 Pecos Avenue in Port Arthur, Texas. [Tr. 25.]

• • • •

Q: All right, were some of the men, to your personal knowledge, did they actually belong to construction unions?

A: We never asked them, but to my personal knowledge, we had several union personnel, card-carriers, union people on our job working. [Tr. 33.]

• • • •

A: [There] was an editorial written by the Beaumont Enterprise stating that we were paying substandard wages, we were getting men from out-of-state to come in to do the job and this kind of a statement which was totally untrue, and we confronted the man and he apologized for it—for writing the editorial.

Q: When was the editorial in the paper?

A: Pardon?

Q: When was the editorial in the paper?

A: It was right after the incident. [Tr. 64.]

B. *Testimony of Plaintiff A.A. Cross*

Q: How did you go about engaging employees to work for you?

A: Our usual way, we made the information available to all our former employees, everybody in the area that we were looking for help. We advertised in all of the papers throughout the State, some out-of-state papers, we have a way of communicating to the industry that we are looking for help, we used that way.

Q: All right, and then did you man the job with carpenters, ironworkers and the like?

A: Yes, we did.

Q: All right, did you hire people from this locale?

A: Yes, we did.

Q: Did you inquire whether they belonged to Unions or did not belong to a Union?

A: No, I didn't. [Tr. 163-164.]

• • • •

Q: Is it true you were using personnel on the job—some of them were local and some of them were from out-of-state?

A: I really don't know where any of the personnel on the job were from.

Q: All right, did you make any particular effort to confine employment of persons on the job to local personnel or did you use anyone who came in?

A: I made no effort to confine it to local personnel or foreign personnel.

Q: Is it true that when you came into the area you brought personnel with you from out-of-state?

A: No, we didn't have any people from out-of-state.

Q: Well, from out of the County.

A: We brought some people from Houston. I don't know—

Q: Well, were you made aware at any time prior to this incident that there was some dissention in the community concerning your use of persons from outside the County?

A: No. [Tr. 201-202.]

Q: Well, did you read an editorial in the newspaper that concerned itself with that subject, about the use of out-of-County labor?

A: Yes, I did after the attack at our jobsite. [Tr. 201-202.]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 610 (AFL-CIO), et al.,

Petitioners,

—v.—

PAUL E. SCOTT, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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IN THE
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UNITED BROTHERHOOD OF CARPENTERS and JOINERS of AMERICA, LOCAL 610(AFL-CIO) et. al.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The American Civil liberties Union respectfully moves for leave to file the annexed brief amicus curiae in support of respondents.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members dedicated to the

protection of fundamental liberties guaranteed by the Constitution. Security of the person from politically motivated intimidation is a precondition to the enjoyment of our Constitutional heritage. This case raises the question of whether effective federal remedies exist against politically motivated mob violence. In view of the importance of such remedies to the enjoyment of our Constitutional heritage, the American Civil Liberties Union respectfully moves for leave to file the annexed brief amicus curiae in support of respondents.

Respectfully submitted,

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March 16, 1983

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INTEREST OF AMICUS CURIAE

The interest of amicus curiae is set forth in the foregoing motion for leave to file this brief.

STATEMENT OF THE CASE

The relevant facts are set forth in petitioners' brief at pp.2-3 and in the decision of the majority below set forth in the Appendix at A-4 through A-6.

SUMMARY OF ARGUMENT

This case involves an attempt by victims of politically inspired mob violence to assert a federal cause of action for damages against private individuals who beat them because of their beliefs concerning unions. In order to determine whether such a cause of action exists, this Court must confront three questions:

(1) Does Congress possess power to

establish a federal cause of action for politically inspired intimidation; (2) Did the 42nd Congress, in enacting 42 U.S.C. § 1985(3), intend to create such a cause of action; and (3) Were respondents beaten because of their beliefs and associations within the meaning of § 1985(3)?

(a) Congress' power to proscribe private activity which renders it difficult or impossible for persons to formulate and express diverse opinions flows from the affirmative command of Section 5 of the Fourteenth Amendment, as well as the Guarantee Clause and the structural commitment to democratic government which permeates the Constitution.

(b) Congress, in enacting § 1985(3), was attempting to provide an effective remedy for the wave of political terrorism directed at Republicans and their allies in

portions of the South. The 42nd Congress understood that freedom from intimidation in the expression of political views was a privilege and immunity of citizenship which Congress was empowered -- indeed obligated -- to protect against private encroachment. Thus, in enacting § 1985(3), Congress was not intending to establish new rights, but merely to render judicially cognizable fundamental political guarantees independently assured by Section 1 of the Fourteenth Amendment, the Guarantee Clause, the structural imperative of the Constitution and the 42nd Congress' understanding of the Privileges and Immunities Clause. This Court should defer to the intent of the 42nd Congress and construe § 1985(3) as providing effective protection against politically inspired intimidation by private mobs.

c. Respondents were beaten because they elected to work for an employer who declined to sign a collective bargining agreement with petitioners' union. Petitioners' manifest purpose was to punish respondents for actions which manifested a contrary belief or opinion concerning unions. Such violent intimidation based on a victim's beliefs or associations falls within the core coverage of § 1985(3).

INTRODUCTORY STATEMENT

Security of the person from physical abuse and intimidation because of belief or association is an indispensible pre-condition to the functioning of democracy. When fear of retaliation at the hands of public or private bullies poisons the free exchange of ideas and inhibits the formation of individual opinions, self-government becomes an impossibility.

Under our federal system, primary responsibility for protecting personal security lies with state and local law, since politically motivated violations of personal security will inevitably involve tortious as well as criminal conduct. Unfortunately, however, the passions which lead to politically motivated violations of personal security may infect an entire community, sapping its law enforcement potential and

leaving victims of political persecution without an effective means of redress.

Congress, in an effort to provide a supplemental enforcement mechanism less subject to local influence, has enacted a comprehensive and interrelated system of federal law designed to protect individuals from politically motivated violence or intimidation. Thus, for example, 42 U.S.C. § 1983 and 18 U.S.C. § 242 provide for civil and criminal protection against unconstitutional actions by public officials "taken under color law," while 42 U.S.C. § 1985(3) and 18 U.S.C. § 241 provide significant civil and criminal protection against physical abuse or intimidation at the hands of private individuals based on a

1. See generally Monroe v. Pape, 365 U.S. 167 (1961) (§ 1983) and United States v. Price, 383 U S. 787 (1966) (§ 242).

victim's belief or associations.[2] See generally Dorsen, Bender, Neuborne and Law, Political and Civil Rights in the United States, (4th ed.) vol. II, chapter XXV.

In Collins v. Hardyman, 341 U.S. 651 (1951), the Court seriously impaired the Congressional structure by ruling that 42 U.S.C. § 1985(3) did not apply to the conduct of private persons who used force and intimidation to disrupt a political rally. However, in United States v. Guest, 383 U.S. 745 (1966) and Griffin v. Breckinridge, 403 U.S. 88 (1971), this court repudiated the rationale of Collins and ruled that § 1985(3) and § 241 are applicable to private intimidation designed to deter persons from the full enjoyment of certain constitutionally

2. See generally, Griffin v.Breckinridge, 403 U.S. 88 (1971), (§ 1985(3), and United States v. Guest 383, U.S. 745 (1966) (§ 241).

protected rights.[3]

Finally, in Great American Federal Savings and Loan Ass'n v. Novotny, 442 U.S. 366 (1979), this Court ruled that § 1985(3) was not designed to create rights, but to provide a remedy for rights which exist independently of § 1985(3).[4] The

3. The "rights" at issue in Griffin were rights flowing from the abolition of slavery together with all its badges and incidents by the 13th Amendment and the right to interstate travel guaranteed as a privilege and immunity of national citizenship. Since both the 13th Amendment and the Privileges and Immunities clause operate directly upon individuals, the Court found it unnecessary to consider whether rights protected by the 14th Amendment against state action could be secured against private intimidation. 403 U.S. at 105.

4. Novotny involved an attempt to raise a Title VII claim under § 1985(3). This Court ruled that Title VII was the exclusive mechanism for raising claims of employment discrimination by private employers. The Court did not consider whether a § 1985(3) claim would lie against a defendant who was not subject to suit under Title VII. 442 U.S. at 370, n.6

precise question raised by this case is whether in light of Guest, Griffin and Novotny, Collins v. Hardyman was rightly decided on its facts.

This Court noted in Griffin that the intellectual underpinnings of Collins had been eroded, but declined to decide whether, on its facts, the case had been correctly decided. 403 U.S. at 95-96. This case raises squarely the question of whether a federal cause of action exists pursuant to § 1985(3) for violent private activity designed to injure or intimidate another because of the victim's beliefs and associations. In order to answer that question, three issues must be confronted: (1) Does Congress have the power to establish a cause of action for private activity designed to injure or intimidate another because of the victim's beliefs or

associations? (2) Was 42 U.S.C. § 1985(3) intended to establish such a cause of action? and (3) Were respondents beaten because of their beliefs and associations within the meaning of 42 U.S.C. §1985(3)?

I. CONGRESS IS EMPOWERED TO LEGISLATE AGAINST PRIVATE ACTIVITY DESIGNED TO INJURE OR INTIMIDATE ANOTHER BECAUSE OF A VICTIM'S BELIEFS OR ASSOCIATIONS PURSUANT TO AN OBLIGATION TO ASSURE THE CONTINUED EXISTENCE OF THE PRECONDITIONS FOR REPUBLICAN GOVERNMENT.

In Collins v. Hardyman, 341 U.S.651 (1951), the Court suggested that Congress might lack power to legislate against private activity designed to punish persons for expressing political or social opinions. Cf. The Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629(1882); Baldwin v. Franks, 120 U.S. 678 (1887). However, in the years since Collins,

whatever constitutional doubts may have existed as to Congress' power to act against politically motivated mob violence have been resolved squarely in favor of Congress' power to preserve fundamental political rights against private as well as public encroachment. United States v. Guest, 383 U.S. 745 (1966); Katzenbach v. Morgan 384 U.S. 641 (1966);Griffin v. Breckinridge, 403 U.S. 88 (1971). In fact, Congressional power to deal with politically motivated mob violence flows from at least three sources: (1) Section 5 of the 14th Amendment; (2) Article IV, Section 4, the Guarantee Clause; and (3) the structural imperative of democracy which is at the core of our constitutional system.

A. Section 5 of the Fourteenth Amendment

It was once the law that Congress lacked

power to outlaw private conduct in derogation of Fourteenth Amendment values. Cf. The Civil Rights Cases, 109 U.S. 3 (1883). Since, reasoned the Court in The Civil Rights Cases, the constitutional command of Section 1 of the Fourteenth Amendment is directed solely at the States, Congressional authority under Section 5 must be confined to legislative reinforcement of the commands already contained in Section 1. Such an analysis, which bears a distant resemblance to Justice Stevens' concurrence in Novotny,[5] is premised on a view of the Fourteenth Amendment which lays excessive stress on its prohibitory nature and fails to recognize that the purpose of Section 1 is not merely to issue commands but to assure individual

5. Justice Stevens' Novotny concurrence is discussed infra, at 45-50. It deals, not with Congressional power, but with the extent to which the 42nd Congress elected to exercise its power.

enjoyment of the values which the Fourteenth Amendment was designed to preserve. While Section 1, standing alone, may give rise to enforceable rights solely against state action, Congress may, under Section 5, recognize that additional protection of Fourteenth Amendment values against private encroachment is necessary to assure the realization of the basic purpose of the Fourteenth Amendment. Indeed, unless Congress is empowered to establish causes of action which go beyond the literal language of Section 1 of the Fourteenth Amendment, Section 5 would be largely reduced to surplussage, since civil causes of action for the violation of Section 1 rights would exist independently of any Congressional action. E.g., Bivens v. Six Unknown Agents, 403 U.S. 388 (1971); Monell v. Dept. of Social Services, 436 U.S. 658 (1978). Thus,

legislative power under Section 5 should not be measured merely as a warrant to reiterate existing Section 1 prohibitions, but as an affirmative grant of power to go beyond the literal scope of Section 1 in an effort to advance the ultimate purpose of the Fourteenth Amendment.

Although this Court has not yet explicitly recognized Congress' power under Section 5 to protect Fourteenth Amendment values against private intimidation, six members of the Court in United States v. Guest , 383 U.S. 745 (1966), recognized that Congress possessed power under Section 5 to impose criminal sanctions on private behavior designed to impede the enjoyment of Fourteenth Amendment rights.[6]

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6. The opinion for the Court in Guest construed the indictment in question as alleging state connivance in the scheme. (Continued on next page)

As Justice Brennan noted in his concurrence:

> Viewed in its proper perspective, Section 5 of the Fourteenth Amendment appears as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens. 383 U.S. at 784.

Similarly, in Katzenbach v. Morgan, 384 U.S. 641 (1966), this Court ruled that Congress was empowered under Section 5 to ban English language literacy tests for voting in certain settings despite rulings by this Court upholding such tests against Fourteenth

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383 U.S. at 756. However, Justices Clark, Black and Fortas concurred specially on the ground that Section 5 empowered Congress to punish private conspiracies interfering with Fourteenth Amendment rights. 383 U.S. at 761. Justices Brennan, Douglas and Chief Justice Warren concurred in part on the same ground. 383 U.S. at 781-784.

Amendment challenge. In effect, therefore, the Katzenbach Court authorized Congress to go beyond the substantive contours of Section 1 in formulating legislation under Section 5 so long as the legislation was designed to effectuate the fundamental purposes of the Fourteenth Amendment.[7]

Thus, Section 5 of the Fourteenth Amendment provides clear authority for congressional activity designed to cope with politically motivated mob violence which poses a threat to the actual enjoyment of the values which the Fourteenth Amendment was designed to preserve.

B. Article IV, Section 4 -- The Guarantee Clause.

Article IV, Section 4 provides, in part:

7. Katzenbach was recently reaffirmed in Fullilove v. Klutznick, 448 U.S. 448, 476-77 (plurality opinion); 500-01 (Powell, J. concurring) (1980).

> The United States shall guarantee to every State in this Union a republican form of government.

In discussing possible sources of legislative power for the Civil Rights Act of 1871, the 42nd Congress, not surprisingly, stressed the recently enacted Section 5 of the Fourteenth Amendment.[8] However, numerous members of Congress recognized that an additional source of Congressional authority to deal with the epidemic of mob violence which greeted attempts to implement Reconstruction in portions of the South was its duty under Article IV, Section 4, to guarantee to every state a republican form of government. E.g., Cong. Glove, 42nd Cong. 1st Sess. 333-4 (1871) (remarks of (Rep. Hoar); id. at 370 (remarks of Rep. Monroe); id. at 380-1 (remarks of Rep.

8. The Act was entitled "An Act for Enforcement of the Fourteenth Amendment and for other purposes."

Hawley); id. 389-90 (remarks of Rep. Elliot); id. App. at 72-3 (remarks of Rep. Blair). See also id. App. at 159 (remarks of Rep. Golladay) (acknowledging as a Democrat that the Republicans were relying, in part, on the Guarantee Clause).

This Court has, of course, consistently held that the Guarantee Clause fails to provide manageable judicial standards in testing the legitimacy of state governmental action. Thus, in Luther v. Borden, 48 U.S. (7 How.) 1 (1849), this Court declined to decide which of two rival state governments was the true "republican" government of Rhode Island. Following Luther v. Borden, this Court has consistently declined to use the Guarantee Clause as an adjudicatory standard. E.g., Baker v. Carr, 369 U.S. 186, 227-229 (1962).

Recognizing that Guarantee Clause cases

often present non-justiciable political questions does not, however, strip the Guarantee Clause of all meaning. It remains a binding directive addressed to the political branches and, thus, constitutes a significant source of Congressional authority. See e.g., Pacific States Tel & Tel Co v. Oregon, 223 U.S. 118, 142-149 (1912); Highland Farms Dairy v. Agnew 300 U.S. 608 (1937). Indeed, in Texas v. White, 74 U.S. 700 (1869), this Court explicitly relied on the Guarantee Clause as the source of legislative authority to enact much of the Reconstruction legislation of the 39th and 40th Congresses. 74 U.S. at 730-731. More recently, in Laird v. Tatum, 408 U.S. 1, 3-4 n.2 (1972), this Court noted that the companion "domestic violence" provisions of Article IV, Section 4, authorized the enactment by Congress of 10 U.S.C. § 331, empowering the

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President to call out neighboring state militia to suppress an insurrection against a state government.[9]

Thus, although the number of cases in which Article IV § 4 has been before this Court have been few, and these have consistently held the clause to be judicially unenforceable, the decisions have also recognized that the clause does confer important powers on the federal government, exerciseable through its political branches. Of these powers, one scholar wrote:

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9. In United States v. Josephson, 165 F.2d 82, 90 (2d Cir. 1947); Barsky v. United States, 167 F.2d 241, 246-47 (D.C. Cir. 1948); and Morford v. United States, 176 F.2d 54 (D.C. Cir. 1949), the Guarantee Clause was properly invoked as a source of legislative power by the House Un-American Activities Committee, although the courts' review of the validity of the exercise of that power under the First Amendment was distressingly narrow.

> The analysis of the guaranty clause in light of contemporary materials demonstrates that it endowed the federal government with great power which was to be used to preserve republican government. As such it was [prior to the Fourteenth Amendment] the only part of the Constitution that afforded the people any protection against abuses in their state governance. And as previously noted, such a check in the hands of the central authority was deemed essential to the continued welfare of the Union.

Bonfield, The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude, 46 Minn.L.Rev. 513, 530 (1962) (emphasis in the original.)[10]

10. Professor Bonfield contended that this "great power" might appropriately be exercised by any branch of the federal government, including the judicial branch in appropriate cases, while acknowledging that Luther v. Borden, for instance, was not at all an appropriate case. See also Bonfield, Baker v. Carr: New Light on the Constitutional Guarantee of Republican Governement, 50 Calif. L.Rev. 245 (1962).

The sole question then is whether Congressional legislation designed to protect persons from politically motivated mob violence is an appropriate means of guaranteeing a republican form of government.

The essential role of speech and associational freedoms in a republican government has long been recognized. At the time of the framing of the Constitution, freedom of speech and association held this special place in the constitutional scheme.

> Republicanism meant more for Americans than simply the elimination of a King and the institution of an elective system. It added a moral dimension, a utopian depth, to the political separation from England -- a depth that involved the character of their society.

G. S. Wood, The Creation of the American Republic, 1776-1787, 47 (1969). This moral dimension was defined by Montesquieu as

"virtue," and he called it the essential principle of a republic. Montesquieu, The Spirit of the Laws, Vol. I, Book I, Ch. 1. To most Americans of the revolutionary era, this notion of virtue meant public responsibility. It was a requirement of dedication to the good of the whole and a duty to affirmatively participate in self-government.

> Since in a free government the public good was identical with people's welfare, a "matter of common feeling" and founded in the "common consent" of the people, the best way of realizing that in the Whig mind was to allow the people a maximum voice in the government.

Wood, supra at 56 quoting from Duché, "Duty of Standing Fast," Moore, ed., Patriot Preachers, 82. Individual political activity was thus seen as a requirement of the republican form of government, that is, its essential element. In guaranteeing that form

of government in Article IV, § 4, the framers not only expected full exercise of individual political rights, but in effect, demanded it. In his much-quoted concurring opinion in Whitney v. California, 274 U.S. 357, 375-376, (1927) Justice Brandeis reached the same conclusion:

> Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.[11]

Thus, the Guarantee Clause provides Congress with the power, if not the duty, to

11. "When men govern themselves, it is they--and no one else --who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American. . . . The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that the public issues shall be decided by universal suffrage." A. Meiklejohn, Free Speech and Its Relation to Self-Government, in Political Freedom 27 (1948).

act against private mobs whose activities prevent Americans from forming and expressing the diverse political opinions without which a republican form of government is meaningless.

C. The Structural Commitment to Democratic Government Inherent in the Constitution

Virtually the entire Constitutional text is implicit with a commitment to representative self-government and democratic values. Ely, Democracy and Distrust (1979). In providing a cause of action to redress the damage caused by politically motivated violations of personal security by private mobs, Congress merely implements the structural imperative of democracy which is at the core of our Constitutional system. C. Black, Structure and Relationship in Constitutional Law (1969). Politically motivated mob violence threatens that structural imperative by rendering it difficult or impossible for

individuals to form opinions and to exchange ideas free from the fear of violent retaliation. Thus, were no other explicit textual support available, Congressional power to legislate in this area would nevertheless flow from Congress' duty to take necessary and proper steps to assure the continued existence of the fundamental pre-requisite to functioning democracy -- freedom from fear in the formation and expression of political views.

Thus, whether one views the issue as an exercise of the powers granted by Section 5 of the Fourteenth Amendment; a discharge of the responsibility imposed by the Guarantee Clause; or a response to the structural imperative of the Constitution itself, Congress' power to act to preserve the preconditions to a functioning democracy by outlawing private terror and intimidation calculated to silence opponents cannot be

seriously questioned. We pass, therefore, to the question of the extent to which the 42nd Congress intended to exercise that power.

II. CONGRESS, BY ENACTING § 1985(3), INTENDED TO CREATE A FEDERAL CAUSE OF ACTION FOR POLITICALLY INSPIRED INTIMIDATION

A. The Background Against Which § 1985(3) Was Adopted

The 42nd Congress enacted § 1985(3) against a background of widespread terror imposed by the Ku Klux Klan on persons who supported the policies of the Reconstruction Congresses.[12] Monell v. Dep't of Social Services, 436 U.S. 658, 665 (1978). Unlike the four other Reconstruction era

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12. This Court has elaborately canvassed the facts surrounding the adoption of the Civil Rights Act of 1871 on numerous occasions. See Great American S & L Ass'n v. Novotny, 442 U.S. 366, 370 n.7 (1979). See generally Comment, A Construction of Section 1985(c) in Light of Its Original Purpose, 46 U. Chi.L.Rev. 402, 407-411 (1979)

Civil Rights Acts, the Ku Klux Klan Act was not aimed at granting or securing substantive rights to freedmen. Rather, it was enacted in an attempt to put an end to a wave of politically inspired terrorism directed at Whites and Blacks alike which was sweeping the South. No purpose would be served by a detailed review of Klan violence here. Three points should, however, be emphasized since they shed light on the core purpose of § 1985(3).

First, it was the widespread perception of the 42nd Congress that the Ku Klux Klan and other similar groups were engaged in terrorizing Republican sympathizers throughout the South.

> But one rule never fails: the victims whose property is destroyed, whose persons are mutilated, whose lives are sacrificed, are always Republicans. They may be Black or White; they include

> those who wore the blue and those who wore the gray; newcomers and life-long residents, but only Republicans. Stain the door lintels with the mark of opposition to reconstruction and of hostility to the national Administration, and the destroying angel passes by. Omit that sign, and the torch may kindle the roof that covers women and children; the scourge may fall upon shoulders that stoop with weakness and with age; the bullet may pierce the breast without warning. Such uniformity of result can come only from design. Republicans only are beaten and mutilated and murdered, because the blows are aimed at Republicans only.

Cong. Globe 42nd Cong. 1st Sess. (1871) (hereinafter "Globe") 413 (remarks of Rep. Roberts). See also id. at 157 (remarks of Sen. Sherman); id. at 252 (remarks of Sen. Morton); id. at 437 (remarks of Rep. Cobb); id. at 457 (remarks of Rep. Coburn.[13]

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13. In the debates, Republican speakers also specifically referred to unionists, Blacks and Northerners ("carpetbaggers") as the objects of Klan attacks. See Globe

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Second, the 42nd Congress understood that the motive behind Klan terrorism was not malice, but a calculated desire to punish and deter the exercise of political activity by persons in political disagreement with the Klan. Id. 390-1 (remarks of Rep. Elliot); id. 429-9 (remarks of Rep. Beatty); id. at 457-459 (remarks of Rep. Coburn); id. App. at 184 (remarks of Rep. Platt); id. App. at 248 (remarks of Sen. Morton).

Third, the ultimate goal of the Klan was to realize certain political goals -- at a minimum, the restoration of the hegemony of the Democratic Party in the

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338 (remarks of Rep. Kelly); id. at 384 (remarks of Rep. Hawley); id. at 441 (remarks of Rep. Butler); id. at 459 (remarks of Rep. Coburn); id. App. at 190 (remarks of Rep. Willard); id. App. at 228 (remarks of Sen. Boreman); id. App. at 229 (remarks of Rep. Stevenson). Unionists were attacked because of the hostility of the Klan to their political beliefs. Blacks were in overwhelming numbers members of the Republican Party (id. at 157 (remarks of
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South, and perhaps including the return to power of the Democratic Party on a national level and the repeal of Reconstruction.

There can be no doubt, therefore, that § 1985(3) was enacted in order to provide an effective remedy for widespread private political intimidation.

B. The Text of § 1985(3)

In order to meet the literal textual requirements of § 1985(3), a plaintiff must demonstrate a conspiracy to deprive a person

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Sen. Sherman), and they and carpetbaggers were attacked, not because of racial or sectional animus, but because of their presumed affiliation with the Republican Party. Id. at 443 (remarks of Rep. Butler) ("...the objects of its fury, as to persons, were negroes and northern men who had gone South, the only friends of republican liberty...").

or class of persons of equal privileges and immunities under the law. Thus, the literal text of § 1985(3) poses no barrier whatever to its application to private activity. Indeed, when one reviews the evolution of the text, its applicability to private political intimidation becomes manifest.

Throughout the debates, it was repeatedly asserted that the term "privileges and immunities" as used in §1985(3) included free speech and association as a principal component. E.g., Globe 414; (remarks of Rep. Roberts); id. at 476 (remarks of Rep. Dawes); id. App. at 265 (remarks of Rep. Barry). See also Id. App. at 81 (remarks of Rep. Bingham).[14] Moreover, under then

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14. The principal speech describing the scope of the term "privileges and immunities" was delivered by Rep. Maynard who, as a member of the 39th Congress, had participated in the passage of the 14th Amendment. Globe 310. He stressed the relationship between privileges and immunities and political activity.

contemporaneous usage, the term privileges and immunities as debated and enacted by the 42nd Congress clearly included the freedom to speak and associate. As generally understood in 1871, the term privileges and immunities encompassed the broad spectrum of rights described in Corfield v. Coryell, 4 Wash. Cir. Rpts. 380 (1823). See Slaughter-house Cases, 83 U.S. (16 Wall.) 36, 79, 118-19 (1873) (suggesting that speech and associational rights were privileges and immunities of citizenship). Of course, subsequent decisions of this Court rejected the argument that rights of free speech and association are privileges and immunities of national citizenship. See Logan v. United States, 144 U.S. 263, 286-87 (1892) explaining United States v. Cruikshank, 92 U.S. 542 (1876). However, merely because this Court has construed a constitutional phrase narrowly does not preclude Congress from utilizing it in a broader

sense.[15] Where, as here, Congress used a phrase with a broad contemporaneous meaning, subsequent Supreme Court contractions of that meaning cannot be permitted to frustrate the obvious legislative purpose to provide protection against political terrorism. Indeed, it was precisely the common understanding of the breadth of the phrase "privileges and immunites" which precipitated the appearance of the major limiting factor in § 1985(3) -- the requirement that the defendants conspire to deprive a person, not merely of privileges and immunities, but of equal privileges and immunities because of a class based animus.

As originally introduced, § 1985(3) contained no requirement of a deprivation

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15. Two notable examples of the differing meanings which may be applied to the same phrase used in both a constitutional and a statutory context are the differential constructions of "arising under" in Article III and 28 U.S.C. § 1331 and the minimum and maximum diversity readings given to the same language in Article III and 28 U.S.C. § 1332.

of equal privileges and immunities or a class based animus. Given the breadth of the concept, several legislators feared that the statute would create a virtual federal criminal code since any serious crime would deprive the victim of one or another privilege or immunity as defined in Corfield v. Coryell. E.g. Globe App. 67 (remarks of Rep. Shellabarger); id. at 334 (remarks of Rep. Hoar); id. at 370 (remarks of Rep. Monroe); id. at 500 (remarks of Rep. Freylinghuysen); id. App. at 229 (remarks of Rep. Boreman). See generally Globe App. 188-89 (remarks of Rep. Willard). In response to such concern, § 1985(3) was amended to require more than a mere deprivation of a privilege or immunity; a successful plaintiff must prove class based animus leading to a deprivation of equal privileges and immunities. The obvious purpose of the narrowing

amendment was to limit § 1985(3) to its core concern. It was precisely because Republicans were being singled out for Klan intimidation that § 1985(3) was enacted. By adding the narrowing requirement, Congress assured that only persons or groups being singled out for intimidation because of their beliefs or associations or their race would fall within its coverage. Thus, ordinary crimes or torts without political or racial overtones would not fall within the narrowed § 1985(3) because no purpose to deny the victim equal privileges or immunities could be established. Politically motivated crimes or torts characteristic of the Klan would, however, become prime candidates for § 1985(3) and § 241.

Where, as here, the literal text; the contemporaneous meaning of the terms; and the internal evolution of the statute

each coincide with the statute's manifest purpose to curb political terrorism, this Court should recognize that the 42nd Congress elected to exercise its constitutional power to protect free speech and association against intimidation and violence at the hands of private persons.

C. The Role of Legislative History

In an attempt to avoid the literal meaning of § 1985(3), petitioners seek to use a selective reading of the statute's legislative history to suggest a requirement of state involvement before § 1985(3) becomes applicable to political terrorism. According to petitioners' theory, a group of moderate Republicans, led by Rep. Garfield, wrongly believed that Congress lacked constitutional power to regulate the conduct of private individuals and insisted upon an across-the-board "state involvement" requirement as the price of their balance

of power support. See Globe App. 153 (remarks of Rep. Garfield).

The most obvious flaw in petitioners' theory is its utter lack of textual support. Unlike § 1983 and § 242 which include explicit state involvement requirements, § 1985(3) is absolutely silent on the need for governmental involvement. Moreover, petitioners' assertion that the narrowing amendment which resulted in the addition of the requirement of a denial of equal privileges and immunities was designed to establish a requirement of state involvement was unanimously rejected by this Court in Griffin. Finally, even if petitioner made a persuasive case that a bloc of moderate Republicans read § 1985(3) as requiring a degree of state involvement -- petitioner does not make such a case[16] -- it is unclear why the intention

16. Petitioner's champion, Rep. Garfield, followed an erratic path, supporting the
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of a small bloc of Congressmen should be given predominant effect. The Civil Rights Act of 1871 passed on a straight party vote with both moderate and Radical Republican support. It is impossible to determine which faction compromised its views or the extent to which individual members of Congress were satisfied with the outcome.

More fundamentally, however, petitioners' appeal to legislative history to frustrate a textually appropriate reading of § 1985(3) which advances its core purpose asks the wrong question. Where, as here, plausible legislative history may be adduced for virtually any reading of a statute, the Court's focus should not be on conducting

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1870 Act, opposing the 1871 Act and, finally, supporting the more inclusive 1875 Act. See Globe App. 153-154 (remarks of Rep. Shellabarger). See also Flack, The Adoption of the Fourteenth Amendment 249 (1908). His chief supporters were no more consistent.

a retrospective head count of the 1871 Congress in an attempt to ascertain how a majority might have voted on the issue of whether § 1985 (3) covers politically inspired mob violence. Rather, the Court should ascertain the "core purpose" of § 1985(3) and adopt the construction of § 1985(3) which best advances that core purpose, so long as it accords with the literal text and so long as it does not conflict with clearly articulated legislative history. See United Steel Workers v. Weber, 443 U.S. 193 (1979).

The "core purpose" of § 1985(3) is not open to serious doubt. It was to provide a federal remedy for politically motivated terrorism. The construction of § 1985(3) which best advances that core purpose is to read the phrase "equal privileges and immunities" as encompassing the exercise of political rights free from the threat of politically inspired intimidation. Neither the text of § 1985(3) nor its legislative

history conflicts with such a purposive reading of the statute. Since reading § 1985(3) as applying to private political intimidation raises no Constitutional problems and advances the statute's core purpose, while respecting its literal text and legislative history, petitioners' elaborate attempt to poll the 42nd Congress on what the alleged balance of power bloc probably intended when it voted for the bill is simply irrelevant.

D. The Relevance of Justice Stevens' Concurrence in Novotny

In his concurrence in Novotny, Justice Stevens noted that, since § 1985(3) was not intended to establish new rights, but was merely intended to provide a judicially enforceable remedy for existing rights, a putative § 1985(3) plaintiff must identify an independent federal right already protected by the Constitution itself or created

by federal statute. See United States v. Johnson, 390 U.S. 563 (1968). When Fourteenth Amendment rights are at issue, Justice Stevens noted that the direct prohibitions of Section 1 operate solely on state action. Thus he reasoned a § 1985(3) plaintiff may not invoke Section 1 of the Fourteenth Amendment as the source of his independent federal right to be free from private intimidation.[17] However, when politically inspired coercion or intimidation is at issue, there are at least three sources of federal law which satisfy Justice Stevens' insistence upon an independent federal source of law for which § 1985(3) porvides merely a remedy.

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17. The search for an independent federal source of law required by Justice Stevens' Novotny analysis is similar to the "arising under" problem in determining whether federal jurisdiction exists. See Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978); Bivens v. Six Unknown Agents 403 U.S. 388 (1971). See also Paul v. Davis 424 U.S. 693 (1976).

First, since the principal purpose of § 1985(3) was to secure the enjoyment of free political belief and association by persons in sympathy with the Republican Party in the South, the "equal privileges and immunities" language of § 1985(3) should be read as providing victims of Klan oppression with a judicially enforceable remedy designed to implement rights which the 42nd Congress believed were latent in the Privileges and Immunities Clause of the Constitution itself. Thus, if it is true that 42nd Congress did not intend § 1985(3) to create "new" rights, it is only because Congress intended to protect political and associational rights which it believed were already protected against private encroachment by the Privileges and Immunities Clause and a broad conception of the

Fourteenth Amendment. Thus, one source of a § 1985(3) plaintiff's right to be free from private political intimidation is the privileges and immunities language of § 1985(3) itself, as it was understood by the 42nd Congress which enacted it.

Second, the federal right to be free from private political intimidation may be derived from Article IV, Section 4. As amicus has demonstrated, the existence of a "republican form of government" is totally undermined when persons are fearful of expressing diverse opinions because of private intimidation. While the difficulty in formulating manageable judicial standards for the Guarantee Clause argues against the recognition of Bivens claims based directly upon Article IV, § 4, the Guarantee Clause does provide a source of federal right to free political belief and association which may be legislatively activated and transformed

into a judicially enforceable right. In enacting § 1985(3), the 42nd Congress intended precisely such a result.

Finally, the source of a federally recognized right to be free from politically inspired mob terrror may be located in the structural commitment to democracy which permeates the entire Constitution. Even in the absence of the explicit wording of the Guarantee Clause, the body of the Constitution is implicit with a promise of democratic government which cannot be fulfilled under conditions of politically inspired coercion and intimidation. While the structural logic of the Constitution, standing alone, may not be sufficient to ground a judicially enforceable right[18] surely it suffices to anchor a legislative enactment specifically intended

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18. See generally C. Black, Structure and Relationship in Constitutional Law (1969).

to make it judicial cognizable.

Thus, given the sources of law both in §1985(3) itself and latent in the Constitution, only an excessively mechanical reading of the relationship between § 1985(3) and "state action" would result in the refusal to recognize a judicially cognizable § 1985(3) claim for private political intimidation.

III. RESPONDENTS WERE BEATEN BECAUSE OF THEIR BELIEFS AND ASSOCIATIONS WITHIN THE MEANING OF § 1985(3)

Amicus has argued that Congress possesses clear Constitutional authority to outlaw politically motivated mob violence and that the 42nd Congress intended to exercise that power in an effort to halt Klan terrorism directed at Republican sympathizers. The sole remaining question is whether petitioners' activities constituted the type of mob violence for which § 1985(3) was intended

to provide a federal remedy.

Petitioners beat respondents when they sought to work in a non-union shop. Obviously, the degree of violence and intimidation used by petitioners falls clearly within the intended coverage of § 1985(3).[19]

Similarly, amicus suggests, attempts to intimidate employees into joining -- or not joining -- a labor union are within the intended scope of § 1985(3). The local passions engendered by a bitter labor dispute are no less likely to threaten the even-handed administration of justice at the local level than classic political disputes. The sole question in deciding whether respondents were the victims of class-based discriminatory animus within the meaning of Griffin should

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19. It is, therefore, not necessary for the Court to consider the extent to which non-violent forms of intimidation fall within the coverage of § 1985(3).

be whether they were attacked because petitioners concluded that they adhered to a point of view about unions which petitioners found distasteful. Whether a victim is singled out for intimidation because he is a Republican, a Communist, a union member, or a foe of labor unions, § 1985(3) provides a much needed supplemental federal remedy for private attempts to interfere with free political expression or association.

CONCLUSION

Respondents do not argue for the establishment of a general federal law of torts. Rather, respondents seek merely the enforcement of the core of § 1985(3) -- the provision of federal relief from politically inspired mob terror. Indeed, if petitioners' conduct does not fall within § 1985(3), the work of the 42nd Congress will be trivialized and the Congressional attempt to establish

an effective remedy against political terrorism will be reduced to a prohibition against attacking Blacks travelling on interstate highways. While such a prohibition is, of course, worthwhile, it is a far cry from the ambitious efforts of the 42nd Congress to stem the depredations of the Ku Klux Klan.

The decision of the Court below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 610 (AFL-CIO), *et al*,

Petitioners,

v.

PAUL E. SCOTT, *et al*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF FOR ASSOCIATED BUILDERS & CONTRACTORS, INC., AMICUS CURIAE

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No. 82-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 610 (AFL-CIO), *et al*,

Petitioners,

v.

PAUL E. SCOTT, *et al*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Associated Builders & Contractors, Inc. respectfully moves for leave to file an Amicus Curiae Brief in this cause. Respondents have consented to the filing of this Brief. The letter of consent accompanies this Motion and Brief, for filing with the Court. Counsel for Amicus has sought the consent of Petitioners to the filing of this Brief by written correspondence. As of the time of preparation of this Motion, counsel for Petitioners have not responded to said request for consent.

The Associated Builders & Contractors, Inc. is a nation-wide, non-profit corporation with over 17,000 member companies in the construction industry in the United States. During its 32-year existence, the Association has united construction contractors of all trades who believe in free enterprise in the construction industry. The Association assists its members through apprenticeship programs, seminars, publications on business

developments, safety in the industry, labor relations and related activities. These contractors employ workmen regardless of membership or non-membership in labor unions and abide by their choice to have or decline collective bargaining by a union pursuant to their fundamental rights and Section 7 of the National Labor Relations Act.

This case is of great importance to the Association as it concerns matters which involve all of its members. The small, local contractors in this country are very concerned that the rights they and their employees have always enjoyed not be taken away. A. A. Cross Construction Company, one of the Respondents, was an Association member at the time of the incidents involved in these proceedings.

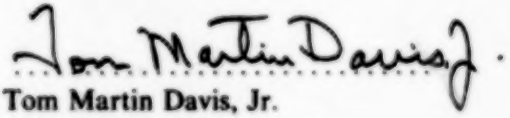
The Association believes that the Respondents' fundamental rights of association were violated by the violent actions of the Petitioners and that the only adequate means of redressing this violation is under 42 U.S.C. § 1985(3). The remedies available under the National Labor Relations Act, of which Respondent, A. A. Cross Construction Company availed itself, are incapable of remedying the type of harm involved in these facts. The Labor Board's injunction as to the Petitioners, prohibiting future violent acts, offers no salve for the wounds already inflicted. To prevent future harm means little to the one who has just experienced the devasting effects of violent activity. In this instance, where the fundamental right of association is violently infringed upon and the Board's remedies are sadly inadequate, resort must be available to the remedial processes of § 1985(3).

Because of the Association's membership and unique function in the construction industry, it is well qualified to submit an amicus brief in this proceeding. Particularly in relation to the issue addressed in this brief — Section 7 rights of employees, though protected by the National Labor Relations Act, encompass fundamental rights protected in other federal statutes, specifically, 42 U.S.C. § 1985(3).

On the issues addressed in the Respondent's Brief, we associate with the ably-presented positions of the Respondents. Our purpose herein is to suggest several additional considerations to guide the Court.

For these reasons, we respectfully request leave to file this Amicus Curiae Brief.

Respectfully submitted,



Tom Martin Davis, Jr.
Attorney for Amicus Curiae

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR ASSOCIATED BUILDERS & CONTRACTORS, INC. AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae is set forth in the preceding Motion for Leave to File this Brief.

SUMMARY OF ARGUMENT

The Respondents in *Scott* v. *Moore* bring their cause of action under 42 U.S.C. § 1985(3). The Petitioners have asserted that Respondents have two major problems with their ability to bring suit under § 1985(3). First, they have stated that the right of

employees to refrain from organizational activities is not a constitutionally protected right and as such does not come within the scope of § 1985(3); and second, that the problems addressed in *Scott* v. *Moore* are labor law issues and as such subject to the exclusive jurisdiction of the National Labor Relations Board under the preemption doctrine of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959).

A consideration of the historical background of the Section 7 right to refrain from organization refutes any assertion that the right has no significance apart from the National Labor Relations Act (hereinafter "Act"). The right is clearly a fundamental right derived from the historical right of association, right of assembly and right to pursue a chosen trade. Section 1985(3) extends to protect all rights which are fundamental rights of national citizenship, *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), and included in these rights is the right of association.

The preemption doctrine of *Garmon* with respect to labor disputes, although still valid with regard to typical, uncomplicated labor situations, has become riddled with exceptions both through congressional enactment and through judicial decisions. The Respondents in *Scott* v. *Moore*, by seeking to litigate their claims under § 1985(3), are not forging new paths but merely following in the footsteps of those who have gone before them. The facts before us lend credence to the assertion of an exception to the labor preemption doctrine. The violent nature of the Petitioners' action, coupled with the inadequacy of the Board remedies available, clearly places us within established exceptions to the doctrine.

The fundamental nature of the rights asserted herein when considered with the violently abusive actions of the Respondents, merit this Court's upholding the decision of the Fifth Circuit in order to provide the Respondents with the remedy to which they are entitled.

ARGUMENT

I.

THE RIGHT TO REFRAIN FROM ORGANIZATION, GUARANTEED TO EMPLOYEES UNDER SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT, ORIGINATES FROM THE FUNDAMENTAL RIGHT OF ASSOCIATION AND THE NATIONAL LABOR RELATIONS BOARD'S JURISDICTION IN THIS AREA IS CONCURRENT WITH THAT OF THE FEDERAL AND STATE JUDICIARY.

Petitioners here assert that the right of an individual to refrain from organization does not qualify the Respondents for constitutional protection. (Petitioner's Brief at p. 7). They have argued previously that such right originates from the National Labor Relations Act and that under the *Garmon* doctrine of labor law preemption, considered with the Supreme Court's rationale in *Great American Fed. S&L Assn.* v. *Novotny*, 442 U.S. 366 (1979), a cause of action does not exist under 42 U.S.C. §1985(3) for a subsequently created statutory right.

A. The Associational Right Of An Employee To Refrain From Organizational Activity Is A Fundamental Right Which Preceded The Enactment Of The National Labor Relations Act

Petitioners in their brief to the Court assert that the employees right to refrain from organizational activity is not included in the First Amendment right of association. (Petitioners' Brief at p. 7). Accordingly, they urge that this Court find error with the Fifth Circuit's position that "there is an associational right stated in the Constitution to work in the private sector under an industrial relation system of one's choice." (Petitioners' Brief at p. 12). Since they do not view the employee's right to refrain from organizational activity as a constitutionally protected right, it is the Petitioners' position that the *Novotny* decision is controlling in this instance, where the Court found

that statutorily created rights are not covered by Section 1985(3). (Petitioners' Brief at pp. 10, 11).

It is Respondent's position, and this amicus brief will show, that the right asserted in *Scott* v. *Moore* is indeed a fundamental right which although embodied in the Constitution, actually pre-exists that document. The Petitioners' contentions throughout their brief are based largely on the premise that the right to refrain has no independent basis apart from the National Labor Relations Act; once this point is refuted, the Petitioners' objections to Respondents' cause of action under §1985(3) collapse.

The employee's right to refrain from organizational activity was included in Section 7 of the National Labor Relations Act by the Taft-Hartley Amendments, officially known as the Labor Management Relations Act of 1947. These amendments were enacted to counterbalance the restrictions placed upon employers by the National Labor Relations Act of 1935, by placing similar restrictions on the unions. The amendment to the Section 7 rights of employees, by the addition of the right of employees to refrain from exercising organizational rights, was intended to give equal weight to the Section 7 rights of employees to either organize or choose not to organize, an accommodation somewhat obscured under the original Act.

The Supreme Court, in the historic decision of *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1936), which confirmed the validity of the National Labor Relations Act and upheld its provisions as constitutional, also described the right of employees to organize and converse (the Section 7 rights of the new Act), as "a fundamental right." In referring to section 7, the Court stated:

> Thus, in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without

> restraint or coercion by their employer. *That is a fundamental right. Id.* at 33 (emphasis added).

The Court recognized the legality of collective action on the part of the employee and stated that Congress by enacting the National Labor Relations Act was "safeguarding the right of collective action." *Id.* at 34. Emphasizing the importance of non-interference with this freedom of choice and addressing the allegation that the employer's constitutional right had been interfered with, the Court stated that, "instead of being an invasion of the constitutional right of either, [the prohibition] was based on the recognition of the right of both." *Id.* It is clear from the above comments that by enacting the National Labor Relations Act, Congress did not create any new rights, but merely recognized and "safeguarded" pre-existing rights.

An analysis of this "right to refrain" is important in order to understand what led the Court to describe this right as a "fundamental right," which pre-existed the National Labor Relations Act. A consideration of the numerous court decisions, which preceded the enactment of the National Labor Relations Act and considered the importance of an economic right guaranteed to the individual to pursue a chosen trade, are helpful to this analysis.

The Supreme Court in 1884 in *Butchers' Union Slaughterhouse and Livestock Landing Co.* v. *Crescent City Livestock Landing & Slaughterhouse Co.*, 111 U.S. 746 (1884), overturned a Louisiana monopoly statute which had the effect of denying citizens of Louisiana the right to pursue a chosen trade. Justice Bradley in his concurring opinion presented some important historical background on the issues involved in the case, specifically, the right of men to follow a given occupation. Tracing this right back to the common law of England and the Act of 21 James I, Justice Bradley described these anti-monopoly laws as:

> One of the constitutional landmarks of British liberty, like the petition of right, the habeas corpus act, and other great constitutional acts of parliament. They established and declared one of the inalienable rights of free men which our ancestors brought with them to this country. *The right to follow one of the common occupations of life is an inalienable right*; it was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence, which commenced with the fundamental proposition that "all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." This right is a large ingredient in the civil liberty of the citizen. *Id.* at 762 (emphasis added).

Thus, did Justice Bradley trace the history of the right of association from its early inception in common law England to the beginning of our country and the Declaration of Independence. It was this "primordial and fundamental right" which was subsequently embodied in the First Amendment of the Constitution. He stated that this right "to follow any of the ordinary callings of life" is one which belongs essentially to the citizens of every free government. *Id.*

In another concurrence in the same opinion by Justice Field, this right was described as "the liberty of the individual to pursue a lawful trade or employment;" an "inherent right lying at the foundation of all governmental action" and recognized as such in this country by the Declaration of Independence, *Id* at 756. Justice Field quoted from Mr. Adam Smith, Wealth of Nations, Book 1, Chapter 10, in further delineating this right:

> The property which every man has in his own labor, as *it is the original foundation of all other property, so it is the most sacred and inviolable*. The patrimony of the poor man lies in his strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberties of the workman and of

> those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper. *Id.* at 757 (emphasis added).

It was this same right which the state of Arizona sought to insulate in its constitutional amendment providing that "no person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, and prohibiting anyone to enter into any agreement which excludes any person from employment or continuation of employment because of non-membership in a labor organization." The Supreme Court upheld the right of the State of Arizona to enact this provision in *American Federation of Labor* v. *American Sash & Door Company*, 335 U.S. 538 (1949). In the concurring opinion written by Justice Frankfurter, this right to work of the employee is clearly delineated as "a right of association." *Id.* at 546. Mr. Frankfurter also describes these rights as "cherished rights." *Id.* at 550.

Having considered the right to refrain in its historical context, it becomes clear that the Court's holding and rationale in *Novotny*, 442 U.S. at 366, is simply not applicable to the current proceedings. *Novotny* involved a male plaintiff seeking to redress the violations of his statutory rights guaranteed under Title VII via the remedial processes of 1985(3). *Novotny* asserted no rights which pre-existed the enactment of Title VII; therefore, the Court's finding in *Novotny*, that the Plaintiff was not entitled to the remedial processes of § 1985(3), is not in any way related to the Respondents' assertion in *Scott* v. *Moore* of associational rights which existed prior to the National Labor Relations Act. Accordingly, any reliance by the Petitioners on the holding of *Novotny* as foreclosing the Respondents' right to bring a claim under § 1985(3) is not supportable as a close review of the rights involved in the individual proceedings reveals.

Section 1985(3) extends its coverage to the deprivation of "the equal protection of the laws or of equal privileges and immunities under the laws." These rights have been recognized as including "federally protected rights." In *Griffin* v. *Breckenridge*, 403 U.S. 88, 106 (1971), the Supreme Court recognized these rights as including the right to travel interstate which is a federal right included in the privileges and immunities of national citizenship. Similarly, the right of association, of peaceable assembly or to pursue a chosen trade "is and always has been one of the attributes of citizenship under a free government," *Twining* v. *New Jersey*, 211 U.S. 78, 97 (1908); and a "primordial and fundamental right," *Butchers Union*, 111 U.S. at 762.

The Petitioners' reliance on the limited existence of the right to refrain from organization is simply without support as a review of law and history reveals. To diminish the scope of such a fundamental right to the limited reach of the National Labor Relations Act would severely distort the basic foundation of our legal system. This "inalienable right" as guaranteed in the Declaration of Independence is certainly one to which the Respondents have a justifiable claim. In this proceeding, they seek merely the protection of the laws to which all citizens are entitled.

B. The Congress And Federal And State Courts Have Created Numerous Exceptions To The *Garmon* Doctrine Of Board Preemption Of Labor Disputes.

Defendants have previously contended that the exclusive remedy of the Respondents, with respect to the violent infringement of their rights in this case, is before the National Labor Relations Board. The argument is premised on the labor law preemption doctrine as set forth in this Court's *Garmon* decision. As will be presented, the *Garmon* preemption doctrine has been infringed upon by numerous exceptions.

The violent nature of the actions against the Respondents was clearly outside the scope of the Board's remedial processes. Violent activity alone has been continually recognized as an exception to preemption and when combined with the inadequate remedies available through the Board, the *Scott* v. *Moore* facts clearly fall outside of the preemption doctrine and well within the scope of §1985(3).

The Board's remedies in a case of this nature are severely limited. The Board cannot award damages for economic harm suffered nor can it enjoin any person whose actions cannot be directly related to a union; they may only enjoin the union and those persons clearly tied to the union from future violent activity. The facts of the present case provide clear evidence of how inadequate the Board's remedies are in a situation where violence is present. The A. A. Cross Construction Company (one of the Respondents herein) initially sought the aid of the National Labor Relations Board to enjoin the violent conduct of the union sympathizers. A settlement stipulation was subsequently entered into and a Board Cease and Desist order was entered against the "Sabine Area Building & Construction Trades Council, AFL-CIO, its officers, agents, successors and assigns" to prevent further harm to persons or property. As the language clearly sets forth, the only persons affected by this order were those who could be directly associated with the union as its "officers, agents, successors or assigns"; those private persons who violated the protected rights of A. A. Cross and his employees were unaffected by the Board's order, no injunctive restraints could issue with respect to those persons unable to be connected to the unions involved. Such a limited remedy does not conflict with a cause of action under 1985(3) which extends its remedial provisions to these private actors and is necessary to sufficiently redress the harm suffered by Respondents.

The general doctrine of National Labor Relations Board preemption of labor disputes was established by the Supreme

Court in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. at 236. The Court in *Garmon* held that the Board has exclusive jurisdiction over labor union activity arguably protected by Section 7 of the Labor Management Relations Act or arguably prohibited by Section 8 of the National Labor Relations Act. This broad pronouncement of Board preemption of labor disputes was made in an effort to avoid potential conflict with comprehensive national labor relation policies in the state courts as well as the federal courts. *Id.* at 245. Thus, both federal and state courts ordinarily lack jurisdiction to resolve a labor dispute that arises under the Act in the context of organizational activity, the bargaining relationship or economic sanctions.

While the *Garmon* decision established the basic premise for Board preemption, it also presented certain exceptions to this newly announced preemption doctrine. First, the Court exempted from the doctrine of federal preemption disputes involving matters of "merely peripheral concern" to the National Labor Relations Act. *Id.* at 243. Second, the Court created an exception where "the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act." *Id.* at 244. This exception was further explained in *Garmon* as follows:

> It is true that we have allowed the states to grant compensation for the consequences, as defined by the traditional law of torts, of *conduct marked by violence* and *imminent threats to the public order* . . . We have also allowed the states to enjoin such conduct . . . State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the *maintenance of domestic peace* is not overridden in the absence of clearly expressed congressional direction. *Id.* at 247 (emphasis added).

The high-water mark for the Board preemption doctrine was established with *Garmon* and immediately thereafter began to recede due to the exceptions contained within the *Garmon* decision, itself, and other statutory and judicial exceptions established over the years.

1. Statutory Exceptions To The Preemption Doctrine.

With the enactment of the Taft-Hartley Amendments to the National Labor Relations Act in 1947, Congress began its intrusion into the exclusive jurisdiction of the NLRB. Section 301 of the Labor Management Relations Act (Taft-Hartley Amendments), permits state and federal court suits for breach of a collective bargaining agreement regardless of whether the particular breach is also an unfair labor practice within the jurisdiction of the Board. Section 303 of the Labor Management Relations Act expressly permits anyone injured by a violation of the National Labor Relations Act, Section 8(b)(4), to recover damages in a federal court even though such unfair labor practices are also remediable under the National Labor Relations Act. Section 14(c) of the National Labor Relations Act allows state agencies and courts to assume jurisdiction in labor disputes over which the Board declines to assert jurisdiction, and Section 14(b) of the National Labor Relations Act allows states to regulate agreements creating compulsory unionism (state right-to-work laws). The proviso to Section 10(a) of the National Labor Relations Act allows the Board to cede jurisdiction to the states in cases where the states have met statutory requirements and the Labor Management Reporting and Disclosure Act assures union members of their constitutional rights in dealing with their exclusive bargaining agent.

These various statutory exceptions have been clearly recognized by the Supreme Court in numerous decisions. In *William E. Arnold Co.* v. *Carpenters District Council of Jacksonville and Vicinity*, 417 U.S. 12 (1974), the Court found that when an activity is arguably both an unfair labor practice and a

breach of a collective bargaining agreement, the NLRB's authority with respect to the activity is not exclusive and does not destroy the jurisdiction of the Courts in suits under the LMRA to enjoin a breach of the agreement. This case involved a suit brought under §§301 and 301(a) of the LMRA.

The right of the individual states to enact right to work laws under 14(c) of the National Labor Relations Act has also been upheld by the Supreme Court. In *Retail Clerks International Association, Local 1625 (AFL-CIO)* v. *Schermerhorn*, 375 U.S. 96 (1963), the Court recognized that state courts, rather than solely the NLRB, were tribunals with jurisdiction to enforce a state's prohibition against an "agency shop" clause in a collective bargaining agreement.

2. Judicial Exceptions To The Preemption Doctrine.

Using the *Garmon* exceptions as a springboard, the Supreme Court has found numerous exceptions to be applicable to various fact situations in the labor context. The courts have traditionally found concurrent jurisdiction where the traditional law of torts is involved even if there is an overlap with the Board's jurisdiction.

In *Linn* v. *United Plantguard Workers Local 114*, 383 U.S. 53 (1966), the Court found that a state court does have jurisdiction to apply state remedies in a union campaign defamation case, rejecting the *Garmon* formula with regard to the union activity being protected or prohibited by the Act. The Court found the defamation claim to be a matter of overriding state interest which was "merely a peripheral concern of the Act." *Garmon* 359 U.S. at 243. The Supreme Court in *Linn* also relied on the court's competence to award damages, both compensatory and punitive, as a reason for finding concurrent jurisdiction, establishing an exception where the Board's remedial processes are considered by the Court to be inadequate.

In the more recent Supreme Court decision, *Farmer* v. *United Brotherhood of Carpenters & Joiners of America, Local 25*, 430

U.S. 290 (1977), the Court again applied both of the exceptions established in the *Linn* case. The *Farmer* case involved tortious activity in the form of intentional infliction of emotional distress as well as the consideration of the inadequacy of Board remedies. The suit was brought in state court by a union member against the union and its officials to recover damages for the intentional infliction of emotional distress. The Court in *Farmer* additionally focused on the violent nature of the activities involved, citing the all important exception from *Garmon* of allowing concurrent jurisdiction where violence or threats of violence are involved.

Another important exception to the preemption doctrine is the duty of fair representation as adopted by the Supreme Court in *Vaca* v. *Sipes*, 386 U.S. 171 (1967). The *Vaca* v. *Sipes* test for a breach of the duty of fair representation is:

> Under this [fair representation] doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any [individual], to exercise discretion with complete good faith and honesty, and to avoid arbitrary conduct. *Id.* at 177

The state and federal courts have consistently been found to have concurrent jurisdiction in this area with the Labor Board.

In *Connell Construction Company, Inc.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), the Supreme Court held that the federal courts may decide labor questions that emerge as collateral issues in a suit brought under independent federal remedies, including the anti-trust laws. Accordingly, the Supreme Court found that the union's agreement with the company was subject to the federal anti-trust laws and federal court jurisdiction, providing yet another exception to the preemption doctrine.

In *Alexander* v. *Gardner-Denver Company*, 415 U.S. 36 (1973), the Court found concurrent jurisdiction in an employment discrimination case. The employee working under a collective bargaining agreement was found to have two remedies available to him in employment discrimination: (1) arbitration under the collective bargaining agreement for racial discrimination or (2) a Title VII action through the Equal Employment Opportunity Commission and the courts. The Court found that the right of the plaintiff to bring a Title VII action could not be foreclosed by his first having submitted to the arbitration process. Similarly, the Sixth Circuit has found that prior litigation of an unfair labor practice charge before the National Labor Relations Board does not bar a Title VII claim under the federal statute, because the NLRB deals only with discrimination that interferes with the right to organize. *Tipler* v. *E. I. DuPont de Nemours & Company*, 443 F.2d 125 (6th Cir. 1971).

This finding of concurrent federal court jurisdiction, where labor law questions are collateral issues to suits brought under independent federal statutes, has also been upheld in a case involving 42 U.S.C. § 1985 (3), the statute involved in *Scott* v. *Moore*. In *Silkwood* v. *Kerr-McGee Corporation*, 637 F.2d 743 (10th Cir. 1980), that Court found that the National Labor Relations Board did not have exclusive jurisdiction over the claims asserted in that the deprivation of civil rights through a conspiracy could rarely if ever come within the protection of the National Labor Relations Act and thus produce a substantive conflict of law. Additionally, the Court found that the Board lacked the power to award damages against any of the parties involved in the *Silkwood* case. Balancing such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation, the Court found that concurrent jurisdiction of the federal court with the Labor Board in this instance was proper. Although the Court did not ultimately find that plaintiff's claims were adequate under

the federal statute, the *Silkwood* case is nevertheless important as precedent for finding concurrent jurisdiction of the NLRB and federal courts with regard to 42 U.S. § 1985 (3).

One of the more important Supreme Court decisions regarding exceptions to the preemption doctrine is *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978). Providing further clarification as to the scope of the preemption doctrine, the Court found *Garmon* inapplicable to labor disputes involving union picketing which violated state trespass laws.

The Supreme Court's decision in *Sears* is noteworthy not only for establishing the additional exception to the *Garmon* doctrine of state court jurisdiction over trespass to private property in a labor situation, but also for its approach to the *Garmon* rationale. The Court stated:

> The critical inquiry, therefore, is not whether the state is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to or different from that which could have been, but was not presented to the Labor Board. *Id.* at 197.

The Court found that there is a potential distinction between state law not specifically addressed to labor relations and state law that is. The above passage seems to indicate that the two areas converge only if the general law of the state asks the same questions of the facts as a state labor relations law would have asked. This new approach to the rationale of *Garmon* further delineates the scope of the preemption doctrine.

3. National Labor Relations Board Exceptions to the Preemption Doctrine.

The Labor Board itself has continuously recognized an important exception to its preemption of labor disputes. To encourage voluntary settlement of labor disputes, the Board has consistently deferred to the grievance and arbitration machinery

established under a collective bargaining agreement. *Spielberg Manuf. Co.*, 112 NLRB 1080 (1955).

The numerous examples presented above, where the Board and courts have concurrent jurisdiction over a labor law issue, certainly provide a clear basis for the Respondents maintaining a cause of action under § 1985(3) where the facts involved, "conduct marked by violence and imminent threat to the public order," *Garmon*, 359 U.S. at 247, and the Board's remedies were clearly inadequate, two clearly recognized exceptions to preemption.

The records from the House conference report on the Taft-Hartley Act, H.R.Rep. No. 510 (80th Congress, 1st Session), page 52, indicate that members of Congress recognized the likelihood of concurrent jurisdiction between the Labor Board and the courts. This reference in the legislative records to the existence of concurrent jurisdiction as well as the numerous statutory and judicial exceptions established over the years lend credence to the finding of concurrent jurisdiction in this instance.

CONCLUSION

The right to follow one of the common occupations of life is an inalienable, fundamental right. As a fundamental right, citizens who come within the scope of § 1985(3) and whose fundamental rights are violated, are protected by the remedies available under the statute.

The National Labor Relations Act is legislation aimed at regulating specific problems of management and labor with regard to protection of employee rights. However, the remedies available under the Act are severely limited. There is no redress for the individual where violence is involved, as exhibited by the restrictive injunctions and lack of damages. Where a fundamental right has been violated, an individual is entitled not only to the protection of the Act but to all other available remedies

that are not in conflict with that Act. Accordingly, to protect the Respondents' fundamental rights which have been violated, they must have access to the remedies available under § 1985(3).

Therefore, the decision of the Court of Appeals of the Fifth Circuit must be upheld so that justice might be done.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Motion for Leave to File Amicus Curiae Brief and Amicus Curiae Brief was mailed Certified Mail, Return Receipt Requested to all counsel of record on this the 15 day of March, 1983.

Tom Martin Davis, Jr.

Office-Supreme Court, U.S.
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MAR 18 1983
ALEXANDER L. STEVAS,
CLERK

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-486

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 610 (AFL-CIO), *et al.*,
Petitioners,

v.

PAUL E. SCOTT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

Incidents of violence against nonunion employees are a serious and recurring problem. Nonunion workers in industries from construction to coal mining have been subjected to violent attacks based upon their decision and efforts to perform their contractual obligations on a nonunion basis. Nonunion employers have been repeatedly subjected to attacks upon their property by individuals and groups protesting a nonunion construction project or the opening of a nonunion mine.

Labor relations and, in particular, violence have been traditional concerns of the government of the United States and of the Federal Courts.[1] Local courts and law enforcement agencies are willing and able to use their powers to protect life and property in most potentially violent situations. However, there are far too many in-

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[1] *See*, National Labor Relations Act, 29 U.S.C. §§ 141-187 (1976).

stances in which the strength of local sentiment prevents these agencies from properly protecting nonunion employers and workers from violence, or from providing them with adequate remedies for injuries sustained.[2] Such situations are particularly difficult where the nonunion group is regarded as a class of "outsiders" as opposed to "local people" who feel that they have some right to the jobs being performed on a nonunion basis. The instant case presents such a situation. In its *en banc* opinion below the Fifth Circuit properly applies existing law, 42 U.S.C. § 1985(3), to give an adequate federal remedy to a group of employers and employees injured by acts of violence inflicted upon them because of their nonunion status. The Chamber is strongly of the opinion that violence, intentional torts against person and property, and other coercive tactics have no place in the labor relations context, and are contrary to the public interest.

The Chamber of Commerce of the United States ("Chamber") is the largest federation of business organizations and individuals in the United States. Its total membership exceeds 235,000, including over 230,000 corporations, partnerships and individuals, as well as over 4,000 state and local chambers of commerce and professional organizations. The Chamber regularly presents its

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[2] As the Fifth Circuit noted in its *en banc* opinion below:

> It should be observed that the National Labor Relations Board has a long-established policy against awarding monetary damages for physical injury and property damage caused by strike or picket line violence for which the union is held responsible. . . .

Scott v. Moore, 680 F.2d 979, 996 n.13 (5th Cir. 1982) (*en banc*) (citations and parentheticals omitted).

Other statutory schemes are equally ineffective. *See, e.g.*, Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961-1968 (1976 & Supp. III 1979); The Travel Act, 18 U.S.C. § 1952 (1976); Hobbs Act, 18 U.S.C. § 1951 (1976) and *United States v. Enmons*, 410 U.S. 396 (1973).

members' views to this Court and lower federal courts on issues of major concern to the business community.[3] Many Chamber members are employers and individuals who have been or may be subjected to acts of violence. Many Chamber members occasionally do business in areas where there is some hostility toward the employment of "outsiders." Therefore, Chamber members are vitally interested in the protection of those who have suffered from violence directed at them because they are part of a group that is not affiliated with locally established labor organizations. Thus, with the consent of the parties,[4] the Chamber is appearing as *Amicus Curiae* to urge on behalf of its members that the *en banc* decision of the Court of Appeals for the Fifth Circuit be affirmed.

SUMMARY OF ARGUMENT

I.

The principal issue on appeal is whether Section 1985(3) provides a remedy for injuries sustained by Respondents in an episode of mob violence resulting from a private conspiracy motivated by pervasive regional hostility and ideological animus qualifying as "class-based invidiously discriminatory animus" against nonunion employees and their employer attempting to perform their contractual obligations in "union country" on a nonunion basis. Proper resolution of this issue requires careful analysis of the factors which led the Court to its decision in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), that "all indicators—text, companion provisions, and legislative history—point unwaveringly to § 1985(3)'s coverage of private conspiracies." *Id.* at 101. Analysis of these fac-

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[3] *See, e.g., Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *Whirlpool Corporation v. Marshall*, 445 U.S. 1 (1980); *Associated General Contractors of California, Inc. v. California State Council of Carpenters 46, et al.*, 51 U.S.L.W. 4139 (U.S. Feb. 22, 1983).

[4] This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 36.2. Letters signifying consent have been separately filed with the Court.

tors leads inescapably to the conclusion that the court below was correct in finding that the *Griffin* requirements had been met and that Respondents stated a claim for relief under Section 1985(3).

II.

Analysis of the legislative history of the Congressional debates surrounding the Ku Klux Klan Act, of which Section 1985(3) is a part, compels the conclusion that nonunion employees and their employer, as victims of the sort of class-based, invidiously discriminatory animus to which Respondents herein were subjected, constitute a class within the purview of Section 1985(3) as envisioned by the Forty-Second Congress. The Republican Party was in the majority in the Forty-Second Congress which enacted the Ku Klux Klan Act in 1871. The Ku Klux Klan in 1871 was a political organization which used violence as a means of combatting Northern businessmen, "carpetbaggers," Blacks, Northern laborers and Republicans. The political motivations and pervasive regional hostilities of the Klan point unwaveringly to inclusion, under the facts in the case at bar, of the class of nonunion "outsider" employees and their "outsider" employer within the remedial scope of Section 1985(3). Indeed, the class-based, invidiously discriminatory animus of Petitioners herein was precisely of the sort which Section 1985(3) was designed to remedy. *See Cong. Globe*, 42d Cong., 1st Sess. (1871). Regional animus involving violent means to achieve political ends was of particular concern to Republicans in the Forty-Second Congress, because Klan violence was often aimed at coercing Republicans in the Democrat-controlled South to leave that region.

The legislative history also evinces Congressional concern for persons victimized due to their political beliefs and associations and the kind of regional animus which motivated the Klan. Thus, concern for people discriminated against because of their political associations, cou-

pled with concern for the precarious status of Republicans in the South due to pervasive regional hostility, led to enactment of Section 1985(3). In enacting the Ku Klux Klan Act the Forty-Second Congress intended to protect people victimized because of pervasive regional hostility and their economic and political beliefs and associations. The class of nonunion employees and their employer manifestly qualifies as a class whose members are victimized for these same reasons, and who are thus within the statute's remedial scope.

III.

The requisite class-based, invidiously discriminatory animus required by *Griffin* is also present. Discrimination against nonunion employees and their nonunion employer is class-based, invidiously discriminatory animus proscribed by Section 1985(3) where the animus is regional as well as ideological, and manifests itself through violence. The facts presented typify the hatred of craftsmen in the construction industry who choose to associate with and work for nonunion employers on jobs that a union and its members historically regard as theirs. This Court has long recognized the long-standing animus of unionized workers toward nonunion craftsmen in the construction industry. As Justice Douglas noted in his dissenting opinion in *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675, 692 (1951), "The employment of union and nonunion men on the same job is a basic protest in trade union history." Recognition of the realities of the workplace in the labor relations context unquestionably supports the holding of the court below that Respondents stated a claim for relief under Section 1985(3).

Each of the cases relied upon by Petitioners is distinguishable from the case at bar. None of those cases involved either the regional animus or the violence which are present in this case. Where the animus involves geographical or cultural phenomena akin to the "pervasive regional hostility" present in this case, and when this

animus manifests itself through violent intentional torts such as assaults, batteries and destruction of property, then this qualifies as class-based discriminatory animus proscribed by Section 1985(3).

Lower court decisions, all progeny of *Griffin*, *supra*, accord broad breadth to the scope of class-based conspiracies which fall within the purview of Section 1985(3). The "evolution of the decisional law" post-*Griffin* should be evaluated in the same light as the Court evaluated the trend of cases subsequent to *Collins v. Hardyman*, 341 U.S. 651 (1950). Evaluation of the decisional law post-*Griffin* leads to the inescapable conclusion that the court below was correct in finding that the class of Respondents falls within the remedial scope of Section 1985(3).

IV.

Respondents' claims under Section 1985(3) seek protection of rights clearly within the ambit of the statute and within the power of Congress to protect. The object of Petitioners' conspiracy was to deprive Respondents of their First Amendment associational rights and rights to engage in interstate commerce, thereby depriving them of equal protection within the meaning of Section 1985(3). The legislative history and evolution of decisional law clearly supports this conclusion. The source of Congressional power to reach the conspiracy of Petitioners herein is conferred by the Commerce Clause, Article I, Section 8 of the Constitution.

ARGUMENT

I. RESPONDENTS' CLAIMS ARE PROPERLY COGNIZABLE UNDER SECTION 1985(3)

A. The Decision of the Court Below is Consistent with the Holding of This Court in *Griffin v. Breckenridge*

An analysis of any claim pursuant to 42 U.S.C. § 1985(3)[5] must naturally begin with this Court's decision in *Griffin v. Breckenridge*, 403 U.S. 88 (1971).

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[5] 42 U.S.C. § 1985(3) (Supp. III 1979).

In that case, the Court, relying upon the language of the statute itself, the statute's legislative history and the meaning attributed by Congress and the courts to analogous statutes, held that Section 1985(3) provides a civil remedy for damages arising from wholly private conspiracies aimed at depriving equal enjoyment of rights secured by the law for all. *Id.* at 102. Petitioners' concern that the court below interpreted Section 1985(3) in a manner which creates a general federal tort law is unfounded given this Court's admonition in *Griffin*:

> The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendments. The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

Griffin v. Breckenridge, 403 U.S. 88, 101-102 (1971) (footnotes and citations omitted). As discussed more fully *infra*, in keeping with this admonition, the court below correctly found class-based, invidiously discriminatory animus from the actions of Petitioners herein.

Petitioners' principal argument is that Section 1985(3) requires some sort of state action as contemplated by the Fourteenth Amendment. In so arguing, Petitioners would have the Court ignore the dictates articulated in *Griffin* that:

> [T]here is nothing inherent in § 1985(3) that requires the action working deprivation to come from the State. See, e.g., *United States v. Harris*, 106 U.S. 629, 643. Indeed, the failure to mention any such requisite can be viewed as an important indication

> of congressional intent to speak in § 1985(3) of all deprivation of "equal protection of the laws" and "equal privileges and immunities under the laws," whatever their source.

Id. at 97.

In reaching the conclusion that Section 1985(3) provides a civil remedy for damages arising from wholly private infringements of constitutional rights "whatever their source," the Court articulated the following four elements as necessary to state a cause of action under Section 1985(3):

> . . . [A complaint must allege that the defendant did:] (1) "conspire or go in disguise on the highway or on the premises of another" (2) "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." It must then assert that one or more of the conspirators (3) did, or caused to be done, "any act in furtherance of the object of [the] conspiracy," whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States."

Id. at 102-103. Under the facts herein presented, the court below found that Petitioners' actions satisfied each of these four elements articulated in *Griffin*:

> Griffin's principles indicate the plaintiffs here have made out a cause of action under § 1985(3). The facts of this case clearly embody four of the five elements essential to a successful 1985(3) claim. First, the evidence is sufficient to establish a conspiracy among some of the Council's constituent unions and individual defendants. Second, proof that plaintiffs were assaulted, beaten, and threatened and that property was destroyed establishes the requisite "act in furtherance" of the conspiracy. Third, these acts are indisputably illegal apart from § 1985(3) as required by *McLellan* [*McLellan v. Mississippi Power*

> *& Light Co.*, 545 F.2d 919 (5th Cir. 1977) (*en banc*)]. Fourth, there is evidence of personal injuries, property damage, and economic loss. The only element requiring analysis is the requirement that the conspiracy be for the purpose of depriving a person of the equal protection of the laws or equal privileges and immunities under the laws. This requirement, in turn, has two components: (1) the violation of some protected right and (2) a class-based invidiously discriminatory animus motivating the violation.

Scott v. Moore, 680 F.2d 979, 988 (5th Cir. 1981) (*en banc*).

The court below correctly found that the *Griffin* requirements had been met. Amicus will first present an analysis of the relevant legislative history to place the *Griffin* requirements in the proper historical perspective.

II. THE LEGISLATIVE HISTORY OF SECTION 1985(3) SUPPORTS COGNIZANCE OF RESPONDENTS' CLAIMS

After extensive analysis of the legislative history of the Ku Klux Klan Act, of which Section 1985(3) is a part, this Court in *Griffin* stated, "It is thus evident that all indicators—text, companion provisions, and legislative history—point unwaveringly to § 1985(3)'s coverage of private conspiracies." *Id.* at 101. Further analysis of the legislative history leads inescapably to the conclusion that nonunion employees and their employer, as victims of the sort of class-based, invidiously discriminatory animus to which Respondents herein were subjected, constitute a class within the purview of Section 1985(3) as envisioned by the Forty-Second Congress.

A. The Ku Klux Klan in 1871 Was A Political Organization

The Ku Klux Klan in 1871 was a political organization which used violence as a means of combatting Northern businessmen, "carpetbaggers", Blacks, Northern laborers and Republicans. The political motivations and regional

hostilities of the Klan are especially relevant for determining whether the class of nonunion "outsider" employees and their "outsider" employer are encompassed within the remedial scope of Section 1985(3).

Republicans in the Forty-Second Congress were especially concerned about the political motivations for Klan violence, because Republicans were in the majority in that Congress and Klan violence was often aimed at coercing Republicans in the Democrat-controlled South to leave that region. These concerns prompted the Forty-Second Congress to establish a joint committee to investigate the Klan. The Majority Report of the Senate Select Committee to Investigate Alleged Outrages in the Southern States reported:

> It is clearly established . . . [t]hat the Ku-Klux organization does exist, has a political purpose, is composed of members of the democratic or conservative party, [and] has sought to carry out its purposes by murders, whippings, intimidations, and violence.[6]

The political nature of the problem was repeatedly and vociferously asserted in debates concerning the Ku Klux Klan Act.[7] Republican Congressmen spoke at length regarding the political nature of the Klan. Congressman Stoughton (R-Mich.) described the Klan as having a "political purpose . . . comprised of members of the Democratic or Conservative party," and as achieving its ends through "violence against its opponents." *Cong. Globe*, 42d Cong., 1st Sess. 320 (1971). Congressman Hoar (R.-Mass.) described the Klan as a "secret political conspiracy." *Id.* at 333. Congressman Elliott (R.-S.C.) stated, "the design of the Ku Klux Klan is political." *Id.* at 391. Congressman Roberts (R.-N.Y.) described the Klan as an "organization . . . political in its origins and aims . . . . [T]he victims whose property is destroyed,

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[6] H.R. Rep. No. 1, 42d Cong., 1st Sess. XXX-XXXI (1871).

[7] See *Cong. Globe*, 42d Cong., 1st Sess. (1871); *See also* Avins, *The Reconstruction Amendments Debates*, 484-570 (1967).

whose persons are mutilated, whose lives are sacrificed, are always Republicans." *Id.* at 412-13. Congressman Burchard (R-Ill.) stated: "through their agency the lives and persons of political opponents are doomed to violence and outrage." *Id.* at 312. The record in the House of the Ku Klux Klan debate is thus replete with references to the political motivations for the violent actions of Klan members.[8]

The debate on the Ku Klux Klan Act in the Senate was substantially similar. Republican Senators echoed the sentiments of their House brethren in imputing political designs to Klan violence. Senator Pratt (R-Ind.) remarked that the leading purpose of the Klan "is to punish men for their political opinions." *Id.* at 504. Senator Edmunds (R-Vt.) asserted that the "systematic plan [of the Klan] is not to leave in any of [the Southern] States a brave white man who dares to be a Republican or a colored man who dares to be a voter." *Id.* at 702. Senator Pool (R-N.C.) described the Klan as "a Democratic organization, in the interests of the Democratic Party." *Id.* at 108. Senator Morton (R-Ind.) described the Klan's purposes in a manner which is peculiarly applicable to the facts of the case at bar: "The purpose [of the Klan] is by these innumerable and nameless crimes to drive those who are supporting the Republican party to abandon their political faith and to flee from the State." *Id.* at 252.

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[8] *See, e.g.*, remarks of Congressman McKee (R-Miss.), *id.* at 426 ("The dead and the wounded, the maimed and the scourged, are all, all Republicans."]; Cobb (R-N.C.), *id.* at 437 ("every victim of Ku Klux outrage has been a Republican"); Butler (R-Mass.), *id.* at 443 (Klan is a "political engine in the hands of the [Democratic Party]"; Coburn (R-Ind.), *id.* at 457 (Klan is "political in its nature"); Lansing (R-N.Y.), *id.* at 488 ("the Ku Klux in their crimes are inspired by political zeal"); Blair (R-Mich.), *id.* app., at 72 ("they murder for a difference in political opinions"); Perry (R-Ohio), *id.* app. at 78 (Klans are "organizations in aid of the Democratic party"); Snyder (R-Ark.), *id.* app. at 196 (the "object [of the Klan is] the defeat of Republicanism").

As the foregoing historical analysis reveals, regional animus involving violent means to achieve political ends was of particular concern to the Republican majority in the Forty-Second Congress when it enacted the Ku Klux Klan Act, including Section 1985(3). These debates evince a remarkable similarity between the motivations of the Klan and those of a mob of union members engaged in violent mass picketing against an out-of-state nonunion contractor and its out-of-state nonunion employees. The designs of both are political and regional. The Klan attempted to force Republicans out of the South—the area which they controlled through the conservative Democratic party. Likewise, union members in the Port Arthur area, all members of the constituent local unions of the Sabine Area Building and Construction Trades Council, were endeavoring to force Cross Construction Company and its nonunion employees out of the area—an area which they and their unions controlled. The means by which each attempted to achieve their ends were the same—violence.

B. The Legislative History Evinces Congressional Concern For Persons Victimized Due to Their Political Beliefs and Associations, and Due to the Regional Animus Which Motivated the Klan

A manifestation of the political motivations of the Klan was the regional animus or hostility of Klansmen toward "carpetbaggers," Northern businessmen, Blacks, out-of-town workers and the like. This regional animus is exactly the sort of animus harbored by union workers in a primarily unionized area toward out-of-town, nonunion contractors and their nonunion employees.

These carpetbaggers, Northern businessmen and workers were primarily Republicans who had emigrated South in an attempt to improve their economic circumstances after the Civil War. These Northern emigres often allied themselves with the newly emancipated Black population, which was also a Republican stronghold in the post-Civil War South. They were thus among the classes which the

Forty-Second Congress sought to protect when it enacted the Ku Klux Klan Act.

The concern for these classes and acknowledgement of the regional hostility which existed is evidenced by the statements of several members of Congress. Senator Edmonds (R.-Vt.) chaired the Senate Judiciary Committee at the time, was Senate Manager of the bill, and was thus eminently familiar with its provisions. He explained the bill as follows:

> We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter, (which is a pretty painful instance that I have in my mind in the State of Florida within a few days where a man lost his life for that reason) then this section could reach it.

Cong. Globe, 42d Cong., 1st Sess. 567 (1871).

As this passage indicates, "the congressional debates evince a hearty regard for persons who are victimized because of their political beliefs and associations." *Scott v. Moore*, *supra* at 992. This 'hearty regard' is evidenced repeatedly throughout the debates. Senator Osborne (R-Fla.) reiterated the necessity to protect "men who have gone to the South from the other states in the lawful and harmless pursuit of their proper vocations." *Cong. Globe*, 42d Cong. 1st Sess. 653 (1971). This concern specifically encompassed workers and craftsmen. Senator Freylinghausen (R-N.J.) stated:

> The journeyman cobbler of New England may wrap his awl and wax and lash on his leather apron and stand in Charleston, or New Orleans, or Savannah, and say "here I will settle in despite of the Constitu-

> tion and of the laws of these States; and I have a right to invoke the power of the nation here to protect me". The mason or the carpenter of New Jersey may put his chisels or his trowels in his carpetbag, and go to any part of the land, and say, 'Here I will stay in despite of the holy horror of those who cry out, 'Adventurer!, 'Scalawag', 'Carpetbagger!'.

Id. at 498. Thus, Northern workers who had moved South in search of economic opportunity were contemplated by the framers of Section 1985(3).

Although the Ku Klux Klan today proclaims itself to be a racial organization, it was principally political in nature in 1871. These political motives and the violent means employed by the Klan to achieve their political ends concerned Republicans in the Forty-Second Congress. These violent attacks on Republicans prompted Congressional concern because they were viewed as manifestations of a pervasive campaign to prevent Republicans from establishing the policies of Reconstruction in the South. Thus, concern for people discriminated against because of their political associations, coupled with the concern for the precarious status of Republicans in the South due to pervasive regional hostility, led the Forty-Second Congress to enact Section 1985(3).

Therefore, in enacting the Ku Klux Klan Act, the Forty-Second Congress intended to protect classes of people victimized because of pervasive regional hostility, and their economic and political beliefs and associations. The class of nonunion employees and their employer manifestly qualifies as a class whose members are victimized for these same reasons. Although the "labor union movement in America was yet to be born when the 42d Congress was in session," *Scott v. Moore*, *supra* at 992, inclusion of the class of nonunion employees and their employer who are discriminated against because of their nonunion and out-of-town status is entirely consistent with the original intent of the framers of Section 1985(3).

III. THE REQUISITE CLASS-BASED, INVIDIOUSLY DISCRIMINATORY ANIMUS IS PRESENT

A. Discrimination Against Nonunion Employees and Their Employer Is Class-Based, Invidiously Discriminatory Animus Proscribed by Section 1985(3), Where the Animus is Regional As Well As Ideological, and Manifests Itself Through Violence

The case law which has developed since this Court's decision in *Griffin v. Breckenridge, supra*, reveals the indefensible nature of Petitioners' claim that Respondents have failed to identify a "class" which is protected by Section 1985(3). In *Griffin*, the Court stated only "that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions" in order for there to be a cause of action under Section 1985(3). *Id.* at 102. Since the discrimination in *Griffin* was racially motivated, the Court did not decide "whether a conspiracy motivated by invidiously discriminatory intent other than racial basis would be actionable under Section 1985(3)." *Id.* at 102, n.9. In the years since *Griffin*, the federal courts have addressed the question of what types of nonracial classes are protected by Section 1985(3).

The facts in this case typify the hatred of nonunion craftsmen which historically has existed in the construction industry. At least as early as the decision in *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675 (1951), the courts began to recognize the long-standing animus of unionized building and construction trades members toward nonunion craftsmen in the construction industry. As Justice Douglas said in his dissenting opinion, "The employment of union and nonunion men on the same job is a basic protest in trade union history." *Id.* at 692.[9]

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[9] The animus that Justice Douglas perceived has been repeatedly recognized in the context of a long series of congressional debates on "common situs picketing" legislation and the equally long history of litigation on the same subject. *See, e.g., Proposed Amendments to*

Counsel for the Amicus Curiae know of only four situations other than the present case where Section 1985(3) has been relied upon as a remedy in such situations. Two cases involved industrial construction and construction workers, one coal mine construction, and one immigrant fishermen. In only one instance has the lower court issued a written opinion, and in that case the opinion concerns the denial of the defendants' motion to dismiss.[10] A copy of the Memorandum Opinion in that case is attached hereto as an Appendix. There, the animus was directed against a nonunion out-of-state contractor and its nonunion out-of-state employees who were performing work under a contract to maintain power plants in Baltimore, Maryland which had previously been maintained by Maryland union contractors and union members, most of whom were residents of Baltimore, Maryland. In that case, the class-based discriminatory animus of the Maryland unions and their members against the out-of-state contractor and its employees was alleged to have translated into violent episodes which resulted in personal injuries and property damage—much like the damages suffered by Respondents in the case at bar.

The court below properly recognized the realities of the work place in the labor relations context, and the long-standing animus of union members toward nonunion craftsmen in the construction industry. Recognition of these realities and an understanding of the remedial scope of Section 1985(3) properly led the majority of the Fifth Circuit to hold that Section 1985(3) encompasses a private conspiracy involving regional animus against nonunion employees and their employer.

NLRA, Hearings on S-294, Before the Subcommittee on Labor, 95th Cong., 1st Sess. 45 (1977) (Statement of AFL-CIO official Robert A. Georgine: "In the *Denver* case, the dissenting Justices correctly observed that: 'The employment of union and non-union men on the same job is a basic protest in trade union history.' ")

[10] *Daniel Construction Company, et al. v. Baltimore Building and Construction Trades Council, et al.*, No. R-81-1074 (D. Md. filed April, 1981).

The court below was carefully precise in its holding:

> Our decision does not hold or imply that every union-nonunion controversy can create a section 1985(3) cause of action. Neither does it hold or imply that every instance of violence arising in the context of a dispute about employment will necessarily do so. . . . Neither unionism nor nonunionism suffices to create a covered class. But where, as here, there is no campaign to organize employees and force or violence is used to stake out one group's territorial claim and to deprive other workers and their employer of the right to freely associate with one another, a section 1985(3) action will lie.

Scott v. Moore, supra at 995-996. The persuasive reasoning of the court below and the precise nature of its holding renders the attempts of Petitioners to discredit it spurious.

B. Cases Relied Upon By Petitioners Are Distinguishable

Petitioners quote liberally from *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979), for the proposition that Section 1985(3) cannot encompass a statutorily created right. The court in *Novotny* held that a right created by Title VII could not be asserted under Section 1985(3). To hold otherwise in that case would have allowed the plaintiff to bypass the statutory plan and administrative mechanism created by Congress. *Id.* at 375-76. However, as the court below stated in this case, "Because the litigants here have not attempted to assert a right created by the National Labor Relations Act, the concerns expressed in *Novotny* are inapposite to this case." *Scott v. Moore, supra* at 996, n.12.

Thus, *Novotny* is distinguishable because plaintiff therein asserted a statutory claim, and a statutory, administrative scheme exists under Title VII for cognizance and relief of a litigant's claims. No such scheme exists in the case at bar. Nor is a statutory right asserted by Respondents herein.

The National Labor Relations Board has a long-established policy against awarding monetary damages for physical injury and property damage caused by strike or picket line violence for which a union is responsible. *See, e.g., Union de Tronquistas Local 901 (Lock Joint Pipe & Co.)*, 202 N.L.R.B. 399 (1973); *District 1199 National Union of Hospital and Health Care Employees (Frances Scherver Home and Hospital)*, 345 N.L.R.B. 105 (1979). As further discussed *infra*, the rights asserted by Respondents herein are associational freedoms derived from the First Amendment and rights derived from the Commerce Clause.

Petitioners also place heavy reliance upon *Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743 (10th Cir. 1980) *cert. denied*, —— U.S. ——, 102 S.Ct. 132, *Browder v. Tipton*, 650 F.2d 1149 (6th Cir. 1980), and *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972). Each is distinguishable from the case at bar, because none of these three cases involved violence or regional animus of the sort involved herein.

The Complaint in *Kerr-McGee* alleged that defendants had formed a conspiracy to prevent Silkwood and other employees from organizing a labor union. *Silkwood v. Kerr-McGee, supra* at 745. No allegations of intentional torts or property damage, violence or any discriminatory animus involving regional hostilities appear in the Complaint. Nor were these factors evaluated in that court's decision. Therefore, despite its initial appearance of applicability, *Kerr-McGee* has no real relevance to the case at bar. Under the historical analysis presented *supra*, violence must be a manifestation of the animus in order for it to qualify for coverage under Section 1985(3). The legislative history is replete with references to violence and intentional torts involving assaults, batteries and property damage. Violence of the sort contemplated by the Forty-Second Congress was present in the case at bar, which renders *Kerr-McGee* distinguishable and arguably irrelevant for purposes of this case.

The facts in *Dombrowski* involved arbitrary business discrimination by a corporate landlord and its agents against lawyers engaged in the practice of criminal law. Essentially, the defendants in that case refused to rent office space to Plaintiff because a substantial number of Plaintiff's clients were Black or of Hispanic origin. In addition to finding that the requirement of Section 1985(3) that "two or more persons . . . conspire or go in disguise on the highway" had not been met, the Seventh Circuit held that arbitrary business discrimination against lawyers engaged in the practice of criminal law did not deprive the plaintiffs of "equal protection" under Section 1985(3) absent state involvement. *Id.* at 196. No intentional torts, assaults, batteries, property damage, or violence of any kind were present in *Dombrowski.* Nor is there any discriminatory animus involving regional hostility such as that presented in the case at bar.

Likewise, *Browder* is distinguishable due to the lack of violence. The issue in that case was "whether causing the false arrest of an adversary in a labor dispute violates the provisions of . . . § 1985(3)." In *Browder,* there was no violence, property damage, nor the sort of regional hostility which is present in this case. Although there was no "political or sectional animus" present in *Browder, supra,* the court below in this case was confronted with facts involving mobs of union members engaging in assaults, batteries and property damage, and "pervasive regional hostility toward nonunion employees" performing construction work in "union country." The facts of *Browder* involved neither the regional animus nor the violent manifestations of the class-based, discriminatory animus present in this case.

For these reasons, the *Novotny, Kerr-McGee, Dombrowski* and *Browder* cases, upon which Petitioners place heavy reliance, are distinguishable. It is the position of Amicus that where the animus involves geographical or cultural phenomena akin to the "pervasive regional hos-

tility" present in the case at bar, and when this animus manifests itself through violent, intentional torts such as assaults, batteries and property damage, then this manifestly qualifies as class-based, discriminatory animus proscribed by Section 1985(3).

C. Lower Court Decisions, All Progeny of *Griffin v. Breckenridge*, Accord Broad Breadth to the Scope of Class-Based Conspiracies Which Fall Within the Purview of Section 1985(3)

Petitioners assert that the class-based, invidiously discriminatory animus required by *Griffin* is not present in the instant case. Petitioners would have the Court ignore the growing and well-reasoned body of case law, all progeny of *Griffin*, according protection under Section 1985(3) to classes whose members are discriminated against because of regional animus or their political beliefs or associations. As discussed *supra*, inclusion of these claims within the scope of Section 1985(3) is consistent with the original intent of the framers of the Ku Klux Klan Act.

Classes which have been held to be protected by Section 1985(3) include the following: professors who talk to or associate with the CIA, *Selzer v. Berkowitz*, 459 F. Supp. 347 (E.D.N.Y. 1978); local unions, *Local 1 (ACA) Broadcast Employees v. International Brotherhood of Teamsters*, 419 F. Supp. 263 (E.D. Pa. 1976) *aff'd in part and rev'd in part on other grounds*, 614 F.2d 846 (3d Cir. 1980); demonstrators, *Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate*, 519 F.2d 1335 (3d Cir. 1975), *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975), *cert. denied*, 423 U.S. 930, *Brown v. Villanova University*, 378 F. Supp. 342 (E.D. Pa. 1974); supporters of a political candidate, *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973), *Puentes v. Sullivan*, 425 F. Supp. 249 (W.D. Tex. 1977), *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976), persons voting for a sham candidate, *Smith v. Cherry*, 489 F.2d 1098 (7th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974); wor-

shippers at a predominantly white Catholic Church disrupted by human rights demonstrators, *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) (*en banc*); persons attempting to furnish advice, information, services to migrant workers in agricultural labor camps, *Franceschina v. Morgan*, 346 F. Supp. 833 (S.D. Ind. 1972); victims of sex discrimination, *Hodgin v. Jefferson*, 447 F. Supp. 804 (D. Md. 1978), *Curran v. Portland Superintending School Committee*, 435 F. Supp. 1063 (D. Me. 1977), *Beamon v. W.B. Saunders Co.*, 413 F. Supp. 1167 (E.D. Pa. 1976), *Reichardt v. Payne*, 396 F. Supp. 1010 (N.D. Cal. 1975), *aff'd sub nom. Life Insurance Co. of North America v. Reichardt*, 591 F.2d 499 (9th Cir. 1979); and victims of religious discrimination, *Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973), *Action v. Gannon, supra*; *Rankin v. Howard*, 457 F. Supp. 70 (D. Ariz. 1978), *rev'd on other grounds*, 633 F.2d 844 (9th Cir. 1980), *cert. denied*, 101 S.Ct. 2020; *Baer v. Baer*, 450 F. Supp. 481 (N.D. Cal. 1978); *Ward v. Connor*, 657 F.2d 45 (4th Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1253 (1982).[11]

As the Court in *Griffin* noted with respect to *Collins v. Hardyman*, 341 U.S. 651 (1950):

> it is clear, in light of the decisional law in the years that have passed since that case was decided, that many of the constitutional problems there perceived simply do not exist. Little reason remains, therefore, not to accord to the words of the statute their apparent meaning. That meaning is confirmed by judicial construction of related laws, by the structural setting of § 1985(3) itself, and by its legislative history.

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[11] The court below noted that it found two types of classes within the protection of § 1985(3): (1) classes "having common characteristics of an inherent nature"—i.e., those classes afforded special protection under the equal protection clause; and (2) classes whose members are discriminated against because of their political beliefs or associations. *See, Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340 (5th Cir. 1981) (*en banc*); *Scott v. Moore, supra* at 991-992. The Fifth Circuit placed Respondents herein in the second category. *Id.* at 992.

Griffin v. Breckenridge, supra at 95-96. The 'evolution of the decisional law' post-*Griffin* should be evaluated in the same light as the Court evaluated the trend of cases post-*Collins*. This evaluation will lead the Court to affirm the decision of the court below.

The foregoing line of cases, all progeny of this Court's decision in *Griffin v. Breckenridge, supra*, support the decision of the Fifth Circuit that the class of nonunion employees and their employer fall within the scope of Section 1985(3), where regional union animus qualifying as class-based discriminatory animus exists and violence is employed to force the nonunion employer and its nonunion employees to leave the area.

IV. RESPONDENTS' CLAIMS UNDER SECTION 1985(3) SEEK PROTECTION OF RIGHTS CLEARLY WITHIN THE AMBIT OF THE STATUTE AND WITHIN CONGRESS'S POWER TO PROTECT

The second element of the *Griffin* test, the requirement that the conspiracy be for the purpose of depriving Plaintiffs of the equal protection of the laws or equal privileges and immunities under the laws, is the only element seriously contested by Petitioners. This element requires consideration of two lines of inquiry: (1) whether plaintiffs have alleged violation of a protected right, and (2) whether the requisite class-based, invidiously discriminatory animus is present. *Griffin v. Breckenridge, supra* at 102. Amicus has presented its analysis of the class-based animus requirement. Amicus will now show the Court that Respondents herein have alleged violation of protected rights.

The resolution of this line of inquiry involves two concomitant legal questions: (A) whether the right affected by an unlawful conspiracy is one Congress purported to reach under Section 1985(3); and (B) assuming the answer to this question is in the affirmative, whether Congress constitutionally has the power to reach and provide a means of redress for such a right. *See Griffin v. Breckenridge, supra* at 104.

The Complaint herein clearly avers a conspiracy to violate fundamental freedoms Congress intended to reach in Section 1985(3) and rights constitutionally within Congress' power to protect.

A. The Protected Rights

In *Griffin*, the Court stated that a Section 1985(3) conspiracy "must aim at a deprivation of the equal enjoyment of rights secured by the law to all." 403 U.S. at 102. Respondents herein successfully contended below that the object of the conspiracy of Petitioners was to deprive them of First Amendment associational rights, and that deprivation of these associational rights deprived them of equal protection within the meaning of Section 1985(3) as interpreted by the Court in *Griffin*.

In upholding Respondents' claims of violation of First Amendment rights the court below stated, "so long as *Griffin* remains viable, we are bound by its determination that section 1985(3) reaches all deprivations of equal protection, whatever their source." *Scott v. Moore*, *supra* at 990. This is a correct interpretation of the law.

Although the right of association was not specifically discussed in the debates surrounding passage of the Ku Klux Klan Act, two types of associational rights are frequently mentioned: political associational activities and commercial association. As delineated *supra* in the section which discusses legislative history, the debates are replete with references to the Klan as a political organization and the rights of persons to engage in political association. Similarly, the concern of the Forty-Second Congress with economic association was manifest through the repeated references to carpetbaggers, northern workers and businessmen who had moved South in an effort to improve their economic circumstances. Thus, economic and political association were concerns of the Forty-Second Congress when its members drafted Section 1985(3).

The Court has repeatedly recognized that association for the purpose of advancing economic, as well as politi-

cal and religious, interests falls within the protection of the First Amendment. *See Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 8 (1964); *Thomas v. Collins*, 323 U.S. 516, 531 (1945); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (where the Court recognized that the corollary of the First Amendment's right to associate to advance economic interests is the right *not* to associate). As the court below correctly noted:

> The conspiracy in the case at bar sought to deny completely the plaintiff employees' right not to associate. The district court found that several truckloads of men assaulted the plaintiffs and "threatened to continue violent actions if the nonunion workers did not leave the area or concede to union policies and principles." The conspiracy was intended to deny the nonunion employees their right not to associate either by driving them out of the county or coercing them to unionism through violence. The defendants sought not merely to force plaintiffs to give financial support to a union (an act which *Abood* recognized could interfere with a person's freedom not to associate), but also to force Cross's employees to become union members or leave an area which had been staked out as "union country." The purpose of the conspiracy was to deprive the plaintiffs of a protected right.

Scott v. Moore, *supra* at 990-991. (footnotes omitted). The Fifth Circuit correctly identified the rights protected as those deriving from the First Amendment—the right to associate with other nonunion employees. The rights of Cross Construction Company, as employer-plaintiff, are discussed *infra*.

B. The Source of Congressional Power

In *Griffin* the Complaint alleged violation of several enumerated rights, including rights to freedom of speech, movement, association and assembly; right to petition the government for redress of grievances; rights to be secure in person and home; and right not to be enslaved nor de-

prived of life and liberty without due process. 403 U.S. at 90. The Court found the Thirteenth Amendment and the constitutional right to interstate travel authorized Congress's reach of the private conspiracy in that case. However, the *Griffin* Court cautioned, "In identifying these two constitutional sources of Congressional power, we do not imply the absence of any other." *Id.* at 107. The court below rejected the Thirteenth Amendment and the right to interstate travel [12] as the bases for Respondents' Section 1985(3) action, and upheld the action based upon the Commerce Clause, Article I, Section 8 of the Constitution. *Id.* at 997.

It has long been recognized that citizens of the United States have a constitutional right to engage in interstate commerce. Thus, in *Crutcher v. Commonwealth of Kentucky*, 141 U.S. 47, 57 (1891), the Supreme Court recognized:

> To carry on interstate commerce is not a franchise or a privilege granted by the states; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States.

Moreover, the law is well established that the Commerce Clause, Article 1, Section 8, Clause 3 of the Constitution, empowers Congress to enact legislation regulating purely private conduct, including activity of labor groups, affecting interstate commerce. *See, e.g., Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258

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[12] It is the position of Amicus that the right of interstate travel could, under the facts presented, serve as a proper basis for the Section 1985(3) action in the case at bar. However, the Fifth Circuit's finding that the Commerce Clause adequately supports the claims of Respondents is sufficient for purposes of Amicus' arguments herein. Amicus states that *both* the right to interstate travel as well as the right to engage in interstate commerce serve as adequate bases for the Section 1985(3) claims of Respondents herein.

(1964); and *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 43 (1937).

Petitioners do not contest that Respondents were engaged in interstate commerce. Contentions in their brief are that the Commerce Clause is an inappropriate basis for a Section 1985(3) action.

As the Court held in *Griffin*, the Forty-Second Congress intended to protect the rights to travel and freedom of association against violent, private infringements. As discussed *supra*, classes which the Forty-Second Congress envisioned included carpetbaggers, Northern businessmen, and the like who were engaging in interstate commerce. Thus, the Congressional concern entailed the protection of citizens from private infringements upon their rights to engage in interstate commerce.

The Commerce Clause has served as the basis for enforcing the Civil Rights Act of 1964 against private conspiracies. *See, e.g., Heart of Atlanta Motel v. United States, supra*; *Katzenbach v. McClung, supra*. As the majority below eloquently reasoned:

> It cannot be denied that the aim of protecting interstate commerce from undue burdens is a legitimate end. Congress could reasonably have determined that violent attacks and vandalism perpetrated on the workers of a construction firm engaged in interstate commerce would have a disruptive effect on the flow of products and services among the states. It is also beyond dispute that the aim of protecting interstate workers in the exercise of their First Amendment associational freedoms is a legitimate end. The means adopted for the accomplishment of these ends, a private civil remedy for damages, is plainly reasonable and appropriate. Section 1985(3) as applied to the facts before us is not prohibited by the Constitution and is compatible with both its letter and its spirit. Whether section 1985(3) can constitutionally be applied to other kinds of wholly private conspiracies

to deprive persons of their civil rights is a question for another day.

Scott v. Moore, *supra* at 998.

Similarly, the standing of Cross Construction Company to sue under Section 1985(3) is supported by these authorities.

C. The Employer is an Appropriate Plaintiff

Petitioners' contention that Cross Construction Company lacks standing under Section 1985(3) ignores a well-settled body of case law recognizing the right of corporations to seek protection afforded by the Civil Rights Acts. *See, e.g., Des Vergnes v. Seekonk Water District*, 601 F.2d 9, 16 (1st Cir. 1979) ("It does not matter that Heritage is not an individual. Corporations are persons whose rights are protected by 42 U.S.C. § 1983, ... [citation omitted]. They are also persons who, under the Fourteenth Amendment, have a constitutional right to the equal protection of the laws."); *Fulton Market Cold Storage Company v. Cullerton*, 582 F.2d 1071, 1079 (7th Cir. 1978), *cert. denied*, 439 U.S. 1121 ("It should be noted that the fact that the plaintiff in this suit [claim under 42 U.S.C. § 1983] is a corporation is of no legal significance . . . a corporation is a 'person' within the meaning of the equal protection and due process of law clauses of the Fourteenth Amendment." [citations omitted]); *Sawmill Products, Inc. v. Town of Cicero, Cook County, Illinois*, 477 F. Supp. 636, 638 (D. Ill. 1979) (Sawmill Products Corporation is a person for purposes of equal protection and due process clauses of the Fourteenth Amendment and, therefore, held to have standing under 42 U.S.C. §§ 1983 and 1985(3)); *Mother Goose Nursery Schools, Inc. v. Sendak*, 502 F. Supp. 1319, 1324 (N.D. Ind. 1980) (In action brought by corporation under 42 U.S.C. § 1983, the Court stated: "[A]s a corporation, the plaintiff has all the rights and privileges afforded a person and can sue for deprivation of rights secured by the Constitution and laws." [citations omitted]).

Among the rights deprived by Petitioners' unlawful conduct were the associational freedoms of Cross Construction and its employees. The authorities quite clearly establish that a corporation enjoys the Constitutional guarantees provided in the First Amendment, *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 820 (1978), and that a corporation is entitled to seek judicial relief on its own behalf as well as on behalf of its employees, to protect the latter's Constitutional rights including their freedom of association. *See, NAACP v. Alabama*, 357 U.S. 449 (1958); *Buckley v. Valeo*, 424 U.S. 1 (1976); and *International Union, United Automobile, Aerospace and Agricultural Implement Workers, et al. v. National Right to Work Legal Defense and Educational Foundation, Inc.*, 590 F.2d 1139, 1152 (D.C. Cir. 1978).

In addition to the associational freedoms enjoyed by corporations, Petitioners interfered with Cross Construction's right to engage in interstate commerce. Since *Crutcher v. Kentucky, supra*, the Court has repeatedly recognized and upheld the right of a corporation to engage in interstate commerce. *See, e.g., Oklahoma v. Kansas Nat. Gas Co.*, 221 U.S. 229, 235 (1911) ("The right of a citizen of the United States to carry on interstate commerce is a privilege guaranteed by the Federal Constitution, and is enjoyed without distinction by corporations engaged in interstate commerce as well as individuals . . . [citations omitted]." *Heyman v. Hays*, 236 U.S. 178 (1915); and *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218 (1933). Thus, Cross Construction Company's right to engage in interstate commerce unquestionably exists and clearly suffices to support a claim under Section 1985(3).

CONCLUSION

As discussed herein, the experience of Cross Construction and other nonunion employers and employees is a recurring problem of serious proportions. Respondents herein were subjected to pervasive regional hostility and

ideological animus which manifested itself through violent means, including intentional torts such as assaults, batteries, and property damage. The mechanism recognized by the court below is an appropriate means for providing redress for personal injuries and property damages resulting from violence. It was the intention of the Forty-Second Congress to protect Northern carpetbaggers and businessmen emigrating to the South in search of economic opportunities. Similarly, nonunion contractors and their nonunion employees seeking to work in primarily unionized areas are equally entitled to protection of their rights against violence, which has a disruptive effect upon and unduly burdens interstate commerce.

For the foregoing reasons and those stated in Respondents' Brief, the Chamber respectfully urges that the judgment of the Court of Appeals for the Fifth Circuit sitting *en banc* be affirmed.

Respectfully submitted,

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March 18, 1983

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. R-81-1074

DANIEL CONSTRUCTION COMPANY, a Division of Daniel International Corporation, DOUGLAS L. MANTURANO, CLYDE MASSEY, JIMMY M. MASSEY, ROBERT GENE SPENCER, ERNEST JOHNSON,

Plaintiffs

v.

BALTIMORE BUILDING & CONSTRUCTION TRADES COUNCIL, *et al.*

Defendants

MEMORANDUM AND ORDER

Daniel Construction Co., a South Carolina corporation authorized to do construction contracting in Maryland, and five employees of Daniel, all residents of South Carolina, sue the Baltimore Building and Construction Trades Council (Trades Council), three of its constituent labor organizations (Local 438, Local 16 and Local 37), the business agents of Local 438 and Local 16, and various unidentified individuals and labor organizations for alleged interference with a contract entered into by Daniel on February 1, 1981, to perform maintenance services and other work for Baltimore Gas and Electric Company (BG&E) at various facilities in the Baltimore area. Daniel claims that defendants opposed the contract from its outset because (1) Daniel employees are not represented by any labor union and (2) Daniel is an out-of-state contractor with many employees who are not residents of Maryland.

Specifically, plaintiffs allege that on the morning of April 16, 1981, defendants, and others acting pursuant

to defendants' directions, picketed the entrances of the BG&E plants at Riverside and Wagner in order to prevent Daniel and its employees from performing the work which they had contracted to do. On the morning of April 16, 1981, defendants allegedly assaulted and battered plaintiffs C. Massey, J. Massey, Spencer and Johnson at the Wagner plant and forced them to leave the state. On May 16, 1981, defendants and their representatives allegedly assaulted and battered plaintiff Manturano while he was working at the North Cliff facility of BG&E. Additionally, defendants have allegedly caused "thousands" of their agents and others to throw rocks at Daniel vehicles and employees, block roads leading to the construction sites at Wagner Station, Riverside and Notch Cliff, and built rock walls preventing ingress to and egress from the BG&E facilities. Because of the massive nature of the demonstration against Daniel and its employees, State and County Police were allegedly unable to protect plaintiffs.

Plaintiffs' amended complaint states nine claims for relief:

Count 1 asserts that, in violation of the Civil Rights Act of 1871, 42 U.S.C. § 1985(3), defendants conspired to deprive Daniel and its employees of equal protection of the laws and privileges and immunities guaranteed under the Constitution. Specifically, defendants allegedly interfered with plaintiffs' right to engage in interstate commerce, right to travel and right to freely associate with fellow non-union employees.

Count 2 alleges that defendants failed to prevent the unlawful conduct complained of in Count 1, in violation of 42 U.S.C. § 1986.

Counts 3 and 4 are pendent state claims for intentional interference with contractual relations and interference with plaintiffs' right to pursue a lawful business.

Counts 5 through 9 are claims by individual plaintiffs for assault and battery.

Jurisdiction of this Court allegedly exists under 42 U.S.C. § 1985(3), 28 U.S.C. 1343(1), (2), and (3) and under 28 U.S.C. 1332, based on diversity of citizenship of the parties.

Plaintiffs request an injunction against further interference with their constitutional rights by defendants and an injunction restraining defendants from further picketing. They also request compensatory and punitive damages.

Presently before the Court is defendants' motion to dismiss. The motion has been extensively briefed by both parties and the Court heard oral argument by counsel on January 20, 1982. For the reasons stated below, defendents' motion will be denied.

Class-Based Animus

Section 1985(3), under which plaintiffs' bring their constitutional claims, imposes civil liability on persons conspiring to deprive another person or class of persons of "the equal protection of the laws, or of equal privileges and immunities under the law."[1] In 1971, the Supreme Court broadened the applicability of the statute by removing the judicially imposed prerequisite that the alleged deprivation involved state action. A civil remedy was thus provided for damages against wholly private

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[1] Section 1985(3) reads, in relevant part:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

infringements of constitutionally protected rights. *Griffin v. Breckenridge*, 403 U.S. 88 (1971). The Court in *Griffin* noted, however, that Section 1985(3) was not meant to cover *all* tortious, conspiratorial interferences with the rights of others, but requires "that there must be some racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." *Id.* at 102. The Court then delineated the four elements which a plaintiff must establish in a Section 1985(c) action:

> To come within the legislation a complaint must allege that the defendants did (1) "conspire . . ." (2) "for the purpose depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." It must then assert that one or more of the conspirators (3) did, or caused to be done, "any act in furtherance of the object of [the] conspiracy," whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States."

Id. at 102-103.

Having reviewed the facts alleged here, the Court finds that of the four elements required under *Griffin*, three are clearly met and only the requirement that the conspiracy be for the purpose of depriving a person of the equal protection of the laws or equal privileges and immunities under the laws requires analysis. This requirement has two components: (1) a *class-based*, indiviously discriminatory *animus* motivating (2) conduct which violates some *protected right*. Defendants argue that plaintiffs' action must be dismissed because discrimination based on the non-union status of employees does not constitute the "class-based invidiously discriminatory animus" re-

quired as a motivating factor for conspiratorial acts in violation of § 1985(3).[2] *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Silkwood v. Kerr-Magee Corp.*, 460 F. Supp. 399 (W.D. Okl. 1978), *aff'd*, 637 F.2d 743 (10th Cir. 1980), *cert. denied*, 102 S.Ct. 132 (1981); *Murphy v. Mt. Carmel High School*, 543 F.2d 1189, 1192 n.1 (7th Cir. 1976); *Western Telecasters, Inc. v. California Federation of Labor, AFL-CIO*, 415 F. Supp. 30 (S.D. Cal. 1976). Defendants argue that labor union controversies traditionally have not been considered a proper area for federal intervention and that applying Section 1985(3) in this case opens the door to broad expansion of the classes cognizable under the statute without establishing proper limits. They would construe Section 1985(3) to cover only those classes contemplated as beneficiaries of the Act at its inception, that is classes based on race, religion, political affiliation or beliefs, and, perhaps, gender.

The Supreme Court in *Griffin* specifically refrained from deciding whether a conspiracy motivated by invidiously discriminatory intent *other than racial bias* would be actionable under Section 1985(3). 403 U.S. at 102, n.9. This question has been addressed by lower courts during the ensuing decade. The trend within this circuit appears to be toward expanding the scope of class-based conspiracies which fall within the purview of Section 1985(3). *Ward v. Connor*, 657 F.2d 45 (4th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3570 (Jan. 18, 1982); *Hodgin v. Jefferson*, 447 F. Supp. 804, 808 (D. Md. 1978) (Northrop, J.)

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[2] Preliminarily defendants assert that the amended complaint fails to allege facts sufficient for a finding that the individually named plaintiffs are members of a class of non-union employees. Plaintiffs respond that the allegations in the amended complaint clearly state that "Daniel employees are not and historically never have been, represented by any labor union or unincorporated association." The Court finds these allegations sufficient under Rule 8(a), Fed.R.Civ.P.

The fifth circuit, in a case similar to the one at bar, considered Section 1985(3) claims by a construction company and two of its employees against defendants who allegedly attacked plaintiff's construction site because plaintiffs were not union affiliated. *Scott v. Moore*, 640 F.2d 708 (5th Cir. 1981), *aff'g*, 461 F. Supp. 224 (E.D. Tex. 1978), *rehearing en banc granted*, 656 F.2d 108 (Aug. 31, 1981). There, in an opinion which this Court finds pursuasive, Judge Clark noted that no post Griffin decision by a circuit court had limited the scope of the statute to racially motivate conspiracies. The court found inclusion of suits brought under Section 1985(3), based on discrimination against a "non-union class" to be consistent with the language of the statute and with its legislative history.[3] *Id.* at 718-20. *See Local No. 1 (ACA), Broadcast Employees of International Brotherhood of Teamsters, etc. v. International Brotherhood of Teamsters, etc.*, 419 F. Supp. 263, 275-77 (E.D. Pa. 1976), *aff'd in part and rev'd in part on other grounds*, 614 F.2d 846 (3d Cir. 1980). This Court finds the decision in *Western Telecasters, Inc. v. California Federation of Labor, AFL-CIO*, 415 F. Supp. 30 (S.D. Cal. 1976), holding that the animus behind the conspirator's action in a Section 1985(3) action must be akin to racial bias, not controlling in the instant action. *Silkwood v. Kerr-Magee*

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[3] The remarks of Senator Edmunds, made during the debate preceding the passage of the Civil Rights Act of 1871 are widely quoted by courts attempting to delineate the scope of the Act:

> We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one [from] getting indictment in the State courts against men for burning down his bar; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . then this section could reach it.

Cong. Globe, 42nd Cong., 1st Sess. 567 (1871). *See Griffin*, 403 U.S. at 102, n.9; *Ward, supra*, 657 F.2d at 47; *Scott, supra*, 640 F.2d at 720.

Corp., 460 F. Supp. 399 (W.D. Okl. 1978), *aff'd*, 637 F.2d 743 (10th Cir. 1980), *cert. denied*, 102 S.Ct. 132 (1981), can be distinguished in that there the court found the motivating animus was directed against Karen Silkwood personally rather than against plaintiffs as members of a particular class.

The plaintiffs here, non-union employees and their employer constitute a clearly cognizable and easily identifiable group. The class is not so large and amorphous that its members are indistinguishable from the public at large and its members share a common characteristic beyond simply being victims of the defendants' conspiratorial conduct. *See Scott, supra*, 640 F.2d at 720. In light of the numerous cases recently applying Section 1985(3) beyond race-based animus to classes characterized by gender, religion, occupation and political affiliation, the Court finds no rational grounds for denying application of the statute to the clearly definable, historically recognized, political affiliation of non-union laborers and employers.[4] Thus, the Court holds that claimed discrimination against non-union laborers and their employers alleges sufficient class-based animus for the purposes of stating a claim under Section 1985(3).

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[4] Recent cases included *Glasson v. Louisville*, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975) (supporters of political candidate protected); *Smith v. Cherry*, 489 F.2d 1098 (7th Cir. 1973), *cert denied*, 417 U.S. 910 (1974) (losing political candidate and his supporters); *Marlowe v. Fisking Body*, 489 F.2d 1057 (6th Cir. 1973) (victims of religious discrimination); *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973) (supporters of political candidate); *Selzer v. Berkowitz*, 459 F. Supp. 347 (E.D.N.Y. 1978) (professors who cooperated with the CIA); *Curran v. Portland Superintending School Committee*, 435 F. Supp. 1063 (D. Me. 1977) (victims of sex discrimination); *Franceschina v. Morgan*, 346 F. Supp. 833 (S.D. Ind. 1972) (persons attempting to furnish advice and assistance to migrant workers).

Protected Right

Having found the requisite class-based animus for an action under Section 1985(3), the Court must identify a source of congressional power by which to reach the alleged conspiracy.

In *Griffin, supra*, the Supreme Court, having found class-based animus motivated by racial bias, set out two constitutional sources of power through which § 1985(3) could reach such a purely private conspiracy; (1) the 13th amendment and (2) Congress' power to protect by appropriate legislation the right of interstate travel.

The complaint in this case clearly charges that a purpose of the conspiracy was to prevent the defendants from traveling from state to state. That this allegation is sufficient to support the plaintiffs' cause of action is clear in light of the Fourth Circuit's opinion in *Ward v. Connor*, 657 F.2d 45, 48 (4th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3570 (Jan. 18, 1982). Defendants assert that the right to travel as protected by Section 1985(3) under *Griffin* extends only to blacks who are denied the right because of racial bias. This Court rejects defendant's attempts to impose a racial-bias restriction under this aspect of the *Griffin* analysis. In *Ward*, the Fourth Circuit had no difficulty in finding that a non-Negro right to travel was protected under Section 1985(3). *Id.* at 48. Likewise, this Court finds that the individually named defendants have properly asserted a Section 1985(3) violation of their right to travel.[5]

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[5] Having found congressional authority to reach the conspiracy under plaintiffs' right to interstate travel, the Court need not consider "the troublesome questions of congressional power under Section 5 of the 14th Amendment" which arises as to plaintiffs' 1st Amendment associational rights claim. *Ward, supra*, 657 F.2d at 48, n.5. Nor will the Court address plaintiffs' asserted rights to gainful employment. *See Murphy v. Mt. Carmel High School*, 543 F.2d 1189 (7th Cir. 1976); *Bellamy v. Mason's Stores, Inc.*, 500 F.2d 504 (4th Cir. 1974).

An additional source of Congressional authority to reach the conduct complained of here can be found in the Commerce Clause, Art. 1, § 8, and in the Congressional power, conferred by clause 18 of that article, to make all laws necessary and proper for carrying out the regulation of commerce among the several states. As set forth in the amended complaint, Daniel is a corporation organized under and by virtue of the laws of South Carolina and is engaged in interstate commerce. Pursaunt to its BG&E contract, valued by plaintiff at approximately $1,000,000, Daniel transports men and goods in interstate commerce from South Carolina to Maryland.

There is no question that the commerce clause authorizes Congress to reach and regulate this type of interstate commerce. The Supreme Court has stated that "the power of Congress to promote interstate commerce also includes the power to regular the local incidents thereof, including local activities in both the State of origin and destination, which might have a substantial and harmful effect upon that commerce." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *National Labor Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 13 (1957). It is equally clear that a corporation may assert a violation of its rights under the commerce clause. *See, e.g., Anglo-Chilean Nitrate Sales Corp. v. Oklahoma*, 288 U.S. 218 (1933); *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 235 (1911); *Crutcher v. Kentucky*, 141 U.S. 47 (1891). In light of the analysis above, the Court concludes that all the plaintiffs herein have asserted a claim under Section 1985(3) which is legally and factually sufficient to overcome defendants' motion to dismiss.[6]

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[6] Having found an actionable claim under Section 1985(3), the Court need not consider defendants' argument that no Section 1986 claim for relief will lie if the claim under Section 1985 is not valid. Nor need the Court consider the argument that jurisdiction over the pendent state claims may not be exercised if the federal claims are dismissed.

There is no merit to defendants' claim that the amended complaint makes only conclusory and general allegations and should therefore be dismissed. To the contrary, the complaint specifies the injuries alleged by plaintiffs and provides the date on which the injuries occurred. The complaint clearly satisfies both the requirements of Rule 8, Fed.R.Civ.P., and the judicial standards of specificity established for actions alleging a conspiracy to violate civil rights. *See, e.g., Ostrer v. R. Aronwald*, 567 F.2d 551 (2d Cir. 1977); *Rende v. Rizzo*, 418 F. Supp. 96 (E.D. Pa. 1976).

Defendants argue that plaintiffs' request for injunctive relief is barred under 29 U.S.C. § 105, which prevents courts of the United States from issuing injunctions in certain cases involving labor disputes. 29 U.S.C. § 107(a), however, specifically permits a federal court to issue injunctive relief where it finds "that unlawful acts have been threatened and will be committed unless restrained." Here, acts of violence are clearly alleged. Additionally, an injunction by a federal court is prohibited under Section 105 only in the case of a conspiracy to commit acts enumerated in Section 104, none of which is clearly shown to exist here.

Finally, defendants' argument that the National Labor Relations Act preempts plaintiffs' claims under 42 U.S.C. § 1985(3) is without merit because that Act is concerned with preemption of state law rather that preemption of alternative bases for relief under federal law and is, therefore, inapplicable to plaintiffs' civil rights claim. *See, Sears, Roebuck & Company v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1979); *Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25*, 430 U.S. 290, 298 (1977); *Paca v. Sipes*, 386 U.S. 171 (1967).

For the reasons stated herein, it is this 1st day of April, 1982, by the United States District Court for the District of Maryland,

ORDERED:

1. That the motion by defendants to dismiss is DENIED; and

2. That the Clerk will mail copies of this Memorandum and Order to all counsel of record.

/s/ Norman P. Ramsey
NORMAN P. RAMSEY
United States District Judge

MOTION FILED
MAR 21 1983

NO. 82-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BILL MOORE, ET AL.,
DEFENDANTS-PETITIONERS,
V.
PAUL E. SCOTT, ET AL.,
PLAINTIFFS-RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF
AND
BRIEF OF AMICUS CURIAE,
THE LEGAL FOUNDATION OF AMERICA

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*The majority of the original research upon which this brief was based was done for law school course credit by Nancy R. Wilson, who undertook the task while a law student at South Texas College of Law and completed it while a student at the University of Houston Law Center. Amicus curiae acknowledges this assistance with appreciation.

NO. 82-486

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

BILL MOORE, ET AL.,
Defendants-Petitioners,
v.
PAUL E. SCOTT, ET AL.,
Plaintiffs-Respondents.

MOTION FOR LEAVE TO FILE BRIEF

The Legal Foundation of America ("LFA") moves for leave to file the attached amicus curiae brief and would respectfully show the Court as follows:

1. *Identification of Amicus Curiae:* LFA is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, LFA seeks to preserve economic freedom. Its attorneys have supported the market system of resource allocation and opposed unreasonable regulation in such diverse industries as commercial lending, uranium mining, broadcasting, health care services, and oil and gas production, among others. All litigation undertaken by LFA is approved by its Board of Trustees, a majority of whom are attorneys.

2. *Previous Appearance of LFA's Attorneys in the Fifth Circuit in this Case:* By leave of Court, attorneys for amicus curiae have already appeared in this case in the Fifth Circuit. Amicus is therefore familiar with the issues and its attorneys have participated in developing them.

3. *Interest of Amicus Curiae:* The right of association for economic purposes was a major concern of the drafters of the

statute in question here. Similarly, one of LFA's major purposes is to enhance the right of association for economic purposes. Conduct such as that of the defendants in this case threatens both individual freedom and the economic system, and LFA believes that the litigation initiated by plaintiffs here is an appropriate means of redressing or deterring such conduct.

4. *Desirability of an Amicus Curiae Brief:* The case is complex and includes multiple issues. This amicus curiae's primary activity is to address economic, social, or public policy issues in a manner not generally covered by parties to litigation. In this case, the limitation of section 1985(3) to the purposes intended by Congress without preventing the accomplishment of those purposes is a difficult undertaking, and amicus curiae may be able to assist the Court in developing the issues fully.

5. *Reasons for Believing that Existing Briefs May Not Present All Issues:* Amicus curiae has contacted counsel for plaintiffs-respondents in an effort to avoid duplication. The issue argued in this brief is important to the case but will not be argued by plaintiffs-respondents in the manner in which it is covered here. Specifically, this brief concentrates upon a single issue, namely, whether the right of association can be the focus of a 1985(3) action under the conditions of this case. Amicus curiae believes that the intent of Congress to allow such a suit is clear; that conclusion, however, is sharply contested by defendants-petitioners. Although plaintiffs-respondents are clearly represented by capable and diligent counsel, the proliferation of issues covered in the opinions of the Fifth Circuit make it difficult for one party to develop all important aspects of the case fully.

6. *Consent of Parties or Requests Therefor:* Amicus curiae timely requested consent of the parties. Respondents have consented, and their letter of consent is lodged with the Court. This Motion is filed because of the refusal of counsel for petitioners to consent.

FOR THESE REASONS, LFA requests that it be granted leave to file the attached amicus curiae brief.

Respectfully submitted,

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NO. 82-486

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

BILL MOORE, ET AL.,
Defendants-Petitioners,
v.
PAUL E. SCOTT, ET AL.,
Plaintiffs-Respondents.

INTEREST OF AMICUS CURIAE

Amicus Curiae adopts the statements contained in paragraphs 1, 2 and 3 of the Motion preceding this brief, as showing the interest of amicus curiae. Amicus curiae is a non-profit corporation supporting a public interest law firm, the aims of which include protection of the market system as a means of resource allocation. Amicus believes that conduct such as that of defendants in this case impairs both individual freedom and the market system and that the litigation commenced by plaintiffs is an appropriate means to redress and deter that impairment.

STATEMENT OF THE CASE

Amicus Curiae adopts the Statement of the Case made by plaintiffs-respondents.

SUMMARY OF ARGUMENT

Amicus curiae does not wish to duplicate the detailed case-law and legislative analysis done by respondents, although we agree with that analysis and wish to express support for it. In-

stead, amicus curiae appears here in order to discuss the right of association and its protection under the statute in question.

Among the many arguments made by the defendant unions is the claim that section 1985(3) does not protect the right of association from invasion by private conspiracies. The argument is unpersuasive because interference by the Ku Klux Klan in citizens' exercise of the right of association was one of the most important evils toward which 1985(3) was directed. The purpose of this brief is to discuss the historical understanding of the "privileges and immunities" protected by 1985(3) and to show that the right of association was included in that term.

I.

The most authorative definition of "privileges and immunities" available to the drafters of 1985(3) is to be found in the case of Corfield v. Coryell, 4 Wash. Cir. Ct. Rep. 380, 6 Fed. Cas. 546 (no. 3, 230; C. C. Pa. 1823). Corfield was repeatedly cited in the congressional debate and has been referred to both before and since as the seminal case interpreting privileges and immunities. The Corfield definition includes all rights that are fundamental or natural to civilized society, and it is unquestionably intended to include the right of association.

II.

This court has recently characterized the right of association as among "the most natural privileges of man" and "almost as inalienable . . . as the right of personal liberty." [1] This right is squarely within the historical understanding of privileges and immunities held by the drafters of 1985(3). The right of association is so fundamental that it has been protected against private action even in the absence of legislation in some contexts, and it

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1 NAACP v. Claiborne Hardware Co., 102 S.Ct. 3409, 3437 n. 80 (1982), quoting A. de Tocqueville, Democracy in America 203 (P. Bradley ed. 1954).

would be anomalous if it were not protected under the congressional enactment at issue here.

Defendants' reliance on Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1976), is inapposite. The right asserted in Dombrowski arose under the due process and equal protection clauses, which are qualifications on government action and which therefore can be violated only when there is government action. The right of association is a fundamental right that is personal and individual, and it can be invaded by private conspiracies of the type prohibited by 1985(3).

III.

Even if state or governmental action is required (although amicus contends it is not), the record in this case shows sufficient governmental action to support relief. The record shows repeated warnings by defendants that their town was "union country," analogous to the "company town" of Marsh v. Alabama, 326 U. S. 501 (1946). The defendant unions are fostered, protected and given their extensive powers by governmental action, much in the manner of Burton v. Wilmington Parking Authority, 365 U. S. 715 (1961). The defendant unions' own testimony persuasively shows that the police force and other civil authorities were incapable of controlling union violence without the assistance of defendants. Defendants' violence in this case is thus precisely analogous to the Klan violence at which 1985(3) was directed.

ARGUMENT AND AUTHORITIES

Defendants concede, as they must, that section 1985(3) "covers private conspiracies." Brief of Petitioners at 5, citing Griffin v. Breckenridge, 403 U. S. 88, 101 (1971). The gist of defendants' argument, however, is that the statute does not reach "all tortious conspiratorial interferences with the rights of others," id., and that, according to defendants, section 1985(3) does not reach this case. One of the central arguments of defendants in support of this claim is that the right of association is not among the "privileges and immunities" of citizenship his-

torically protected by 1985(3).

Defendants' arguments in this regard are untenable, and it is the purpose of this brief so to demonstrate.

I. THE HISTORICAL UNDERSTANDING OF "PRIVILEGES AND IMMUNITIES," SET FORTH IN THE LANDMARK CASE OF CORFIELD V. CORYELL, CLEARLY INCLUDES THE RIGHT OF ASSOCIATION.

The most authoritative historical definition of the "privileges and immunities" that 1985(3) was intended to protect is to be found in Corfield v. Coryell, 4 Wash. Cir. Rep. 380, 6 Fed. Cas. 546 (no. 3, 230; C. C. Pa. 1823). Corfield was cited in the congressional debate, and it has been referred to both before and since the enactment of 1985(3) as the seminal case defining privileges and immunities.

A. The definition in Corfield v. Coryell of "privileges and immunities" includes those rights that are fundamental and natural rights of civilized society.

The historical understanding of privileges and immunities is given by the following excerpt from Corfield v. Coryell:

> The inquiry is, what are the privileges and immunities of citizens in the several states? *We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments;* and which have, at all times, been enjoyed by the citizens of the several states . . . What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and

> possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. *These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state,* in every other state, *was manifestly calculated . . . "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union."*

Id. at 551-52. [2]

Several aspects of this historical understanding are note-

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2 For a similarly conceived (although less definitive) historical formulation, see Abbott v. Bayley, 22-23 Mass. [5 Pickering] 89, 90-92 (1827).

worthy.[2a] First, it includes those rights that are "fundamental;" the court gives such examples as the rights to travel, to engage in professional pursuits, and to vote. The right of association is also a fundamental right.[3] Secondly, the definition is obviously intended to encompass those political rights that are essential to the workings of free, democratic government; the court expressly states that privileges and immunities include those rights "which belong, of right, to the citizens of all free governments." Again, the right of association is within the understanding. Third, the list of examples contained in Corfield v. Coryell is merely illustrative, not exclusive: There are "many others [i.e., other rights] which might be mentioned" (but they are "more tedious than difficult to enumerate"). Finally, although the right of association is not mentioned by its modern name, it is clearly identified as among these privileges and immunities, because the court states that the very purpose of the privileges and immunities clause is "to secure and perpetuate mutual friendship and

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2a There may be some differences between privileges and immunities of national citizenship and privileges and immunities of state citizenship. Corfield v. Coryell, of course, was concerned with the privileges and immunities of state citizenship, protected in article IV of the Constitution; 1985(3) is presumably concerned with the privileges and immunities of national citizenship contained in the fourteenth amendment, which it enforces. For several reasons, however, this distinction does not affect the reasoning set forth here. First, the Congress repeatedly cited Corfield v. Coryell in the debates on the Civil Rights Acts as showing the kinds of privileges and immunities it desired to protect. See authorities cited in note 6 below and accompanying text. Further, the same term--"privileges and immunities"--is found in article IV, the fourteenth amendment, and 1985(3), indicating close overlap. Finally, early interpretations of the fourteenth amendment clearly include the right of association within its protections. Thus even the Slaughterhouse Cases, 83 U. S. (16 Wall.) 36, 79 (1873), emphasize that "the right to peaceably assemble and petition for redress of grievances" is within the coverage of the fourteenth amendment. These rights have long been closely related to the right of association. Insofar as this right is concerned, the intended protection is clear under either state privileges and immunities or privileges and immunities of national citizenship.

3 See Part II(B) of this brief, below.

intercourse among the people," or, in other words, to protect the right of association. In summary, the right of association is squarely within the historical understanding of the term "privileges and immunities," which Congress adopted as the object of its protection by enacting 1985(3).

B. The definition of privileges and immunities in Corfield v. Coryell is the most authoritative statement of the historical understanding available, and it was repeatedly quoted in Congress during debate on 1985(3).

Corfield v. Coryell is not merely one of the cases dealing with privileges and immunities. It was the most important such case at the time of enactment of 1985(3). Prior to the enactment of the statute, the Corfield definition given above had been cited as authority in virtually every decision dealing with privileges and immunities. [4] Furthermore, within two years of the enactment of section 1985(3), the Corfield definition was cited with approval by this honorable Supreme Court in the Slaughter-House Cases, 83 U. S. (16 Wall.) 36 (1873). This near-contemporaneous adoption by this Court of the Corfield v. Coryell formula provides an unusually strong indication that it consti-

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4 The report of the case indicates that Corfield v. Coryell was cited in Atkinson v. Philadelphia & T. R. Co., Case No. 615; U. S. v. New Bedford Bridge, Id. 15,867; The Passenger Cases, 7 How. (48 U. S.) 556; Gilman v. Philadelphia, 3 Wall. (70 U. S.) 725; The Clinton Bridge, Case No. 2,900; U. S. v. Hall, Id. 15,282; U. S. v. Anthony, Case No. 14, 459; McCready v. Com., 94 U. S. 395; U. S. v. Petersburg Judges of Election, Case No. 16,036; Hall v. De Cuir, 95 U. S. 513; Williams v. Bruffy, 96 U. S. 183; Ex parte Kinney, Case No. 7,825; The Civil Rights Cases, 109 U. S. 47, 3 Sup. Ct. 47; Butchers' Union, etc., Co. v. Crescent City, etc., Co., 111 U. S. 764, 4 Sup. Ct. 658; People v. Marx, 99 N. Y. 386; Ex parte Chin King, 35 Fed. 356; Marvin v. Maysville St. R. & T. Co., 49 Fed. 437. Quoted in the Slaughter-House Cases, 16 Wall. (83 U. S.) 75, 97, 116, 117, 127.
6 Fed. Cas. at 546.

tuted the historical understanding. In addition, since that time, Corfield v. Coryell has been repeatedly cited by this court, most recently in such landmark decisions as Monell v. Dep't of Soc. Serv., 436 U. S. 658, 670 (1978) and Zobel v. Williams, 50 U. S. L. W. 4613 (1982) (separate opinion). [5]

Perhaps more importantly, Corfield v. Coryell was repeatedly cited or quoted in Congress as providing the definition of the "privileges and immunities" that the Civil Rights Acts were designed to protect. See, e.g., Cong. Globe, 42nd Cong., 1st Sess. 334 (1981) (remarks of Rep. Morgan, citing Corfield and quoting the language quoted above). [6]

II. THE FUNDAMENTAL CHARACTER OF THE RIGHT OF ASSOCIATION IS SUCH THAT IT IS SQUARELY INCLUDED WITHIN THE HISTORICAL UNDERSTANDING OF PRIVILEGES AND IMMUNITIES.

A. Defendants' reliance upon Dombrowski v. Dowling is inapposite, because the due process and equal protection pro-

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5 In modern history, Corfield v. Coryell has been cited by this honorable Supreme Court with approval in at least the following cases (in addition to those cited in the text): Jones v. Helms, 452 U. S. 412 (1981); Baldwin v. Fish & Game Comm., 436 U. S. 371 (1978); Austin v. New Hampshire, 420 U. S. 656 (1975); Lynch v. Household Finance Corp., 405 U. S. 538 (1972); Oregon v. Mitchell, 400 U. S. 112 (1970); Shapiro v. Thompson, 394 U. S. 618 (1969); Duncan v. Louisiana, 391 U. S. 145 (1968); United States v. Guest, 383 U. S. 745 (1966), and Poe v. Ullman, 367 U. S. 497 (1961).

6 See also, e.g., Cong. Globe, 39th Cong., 1st Sess. 475 (1866) (remarks of Sen. Trumbull on Civil Rights Act of 1866, citing Corfield v. Coryell); Id. 1835 (Rep. Lawrence, same). For a discussion of the indications that Corfield v. Coryell was the most important formulation recognized by the Congress, see Williams, "Liberty" in the Due Process Clauses of the Fifth and Fourteenth Amendments: The Framers' Intentions, 53 U. COLO. L. REV. 117, 131-32 (1981).

visions at issue in that case are qualifications upon government power, as distinguished from the right of association, which is personal and individual.

Defendants rely upon Dombrowski v. Dowling, supra, to argue that section 1985(3) does not reach the conspiracy at issue in this case. This conclusion is based upon a misapplication of Dombrowski v. Dowling, and defendant's reasoning amounts to an attempted repeal of this Court's decision in Griffin v. Breckenridge, 403 U. S. 88 (1971).

In Dombrowski, the rights asserted by the plaintiff were claimed to arise under the equal protection clause. Plaintiff protested the "unequal" refusal of a private building owner to rent to him. There is no constitutional right, "fundamental" or otherwise, to rent from the owner of a building. The court declined to hold that the equal protection clause, in and of itself, gave rise to privileges and immunities that could be asserted under 1985(3) in such a situation, because the equal protection clause, like the due process clause, is a limitation upon government conduct, and by itself it does not give rise to rights in the absence of any government action. Thus if monetary benefits are available, such as Aid to Families with Dependent Children, or if disadvantages such as onerous regulation are imposed upon anyone by government, they must be imposed on all similarly situated persons. However, the equal protection clause, by itself, does not give rise to any entitlement until advantages or disadvantages are created by government in the first place. For this reason, the equal protection clause is meaningless without either some more profound personal right within the concerns of a statute such as 1985(3) or some government action. Such was the holding of Dombrowski v. Dowling.

This case, which involves the right of association, is dramatically different. Entitlement to the right of association does not depend upon the government's having given it to anyone else. Instead, the right of association is fundamental, personal, and individual, as the decisions describing the right clearly indicate, and it can be infringed by private conduct such as defendants' conspiracy here.

B. The right of association squarely fits within the historical understanding of the "privileges and immunities" that are protected by section 1985(3).

(1) The right of association fits the historical understanding, and thus the intent of Congress, because it is fundamental.

The historical understanding of "privileges and immunities" emphasizes those rights that are "fundamental." Corfield v. Coryell, supra. There can be no question that the right of association is a fundamental right. This Court has written as follows:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and in acting in common with them. The right of association therefore appears . . . almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409, 3437 n. 80 (1982). [7]

The fundamental nature of the right of association [8] is also

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7 This formula not only expresses the current view of the right of association; it also expresses the historical understanding that was held at the time 1985(3) was enacted. The historical understanding is made clear by the fact that, in setting forth this formulation, the court was itself quoting from A. de Tocqueville, Democracy in America 203 (P. Bradley ed. 1954).

8 The fundamental character of the right extends equally to association for economic purposes. Indeed, in NAACP v. Claybourne Hardware Co., supra, the association was economic in nature. The case concerned the activity of consumers who organized a concerted economic boycott of certain merchants. This court, reversing the

indicated by the requirement of a compelling state interest to support enactments that infringe the right. See, e.g., NAACP v. Alabama, 357 U. S. 449 (1958); see also Brown v. Socialist Workers '74 Campaign Committee, 51 U. S. L. W. 4015 (U. S. S. Ct. 1982). The compelling-state-interest requirement is applied to such concerns as the rights to vote or to travel and to such "suspect classifications" as race; these are the concerns that have been characterized as most clearly within the protection of 1985(3). Cf. Griffin v. Breckenridge, supra.

(2) The right of association fits the historical understanding, and thus the intent of Congress, because it is similar in character to the rights given as examples of privileges and immunities in Corfield v. Coryell.

Corfield v. Coryell did not enumerate all "privileges and

Mississippi Supreme Court, held that the right to engage in this sort of economic association was fundamental in character.

The association here at issue was also political in nature, and this is a second reason for considering it protected. Economic association is closely related to political expression, often coincides with it, and indeed coincided with it in this very case. As the defendant unions' own arguments show, labor controversies such as this one are particularly important political issues in this geographic area, the "Golden Triangle." The associational rights asserted by plaintiffs, here, prompted what the defendant unions call a "citizens' protest, which led to the violence at issue. Defendants themselves emphasized, in their briefs in the Fifth Circuit, that the Golden Triangle is characterized by sharp political differences along "union/non-union lines," that labor union officials are influential community leaders, and that the local press often reports front-page political news concerning labor issues. See part III(A) of this brief, below, for record citations.

In connection with the concept of economic association as a protected privilege or immunity, it should also be pointed out that many of the rights given as examples in Corfield v. Coryell were purely economic in nature. Corfield mentions the right to reside in any state "for purposes of trade, agriculture, professional pursuits, or otherwise." It also emphasizes the right to "take, hold, and dispose of property." Id. at 551-52.

immunities," but it gave certain examples, including the right to vote and the right to travel. The decisions of this court leave little doubt that the right of association is comparable to these rights. For example, in Shapiro v. Thompson, 394 U. S. 618, 643 (1969), Mr. Justice Stewart directly compared the rights of travel and association, stating that the right to interstate travel

> is broadly assertable against private interference as well as governmental action. *Like the right of association, NAACP v. Alabama*, 357 U. S. 449 (1958), . . . it is a virtually unconditioned personal right, guaranteed by the constitution to us all.

The right of interstate travel is protected under the Civil Rights Act of 1871, see United States v. Guest, 383 U. S. 745 (1966), and the comparison thus indicates that the right of association is included within the core concerns of 1985(3) as well. [9]

(3) The right of association fits the historical understanding, and thus the intent of Congress, because it is essential to the democratic function of civilized government.

The historical understanding expressed in Corfield v. Coryell also emphasizes those rights that are essential to the political system or which "belong, of right, to the citizens of all free governments." Id. at 551. The right of association fits this understanding. This Court has described association as follows:

> We begin by recalling that the practice of persons sharing common views banding together to achieve a common end is deeply embedded

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9 See also Raggi, An Independent Right to Freedom of Association, 12 HARV. C.R.C.L.L. REV. 1, 11-18 (1977), for a discussion of the nature of the right.

> in the American political process. The 18th Century Committees of Correspondence and the pamphleteers were early examples of this phenomenon and the Federalist Papers were perhaps the most significant and lasting example. The tradition of volunteer committees for collective action has manifested itself in myriad community and public activities; in the political process it can focus on a candidate or on a ballot measure. Its value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost.

Citizens Against Rent Control v. City of Berkeley, 102 S. Ct. 434, 436 (1981).

(4) The right of association is so important that it has been judicially protected in some contexts even in the absence of legislation. Such protection should be more readily forthcoming under Congressional legislation such as 1985(3).

Rights of expression, petition, assembly and association have been protected by this Court from private infringement in some cases in which state action was remote or nonexistent. For example, in Marsh v. Alabama, supra, the court upheld the right of religious pamphleteers to enter, express themselves, and associate within the confines of a company town that was wholly privately owned. In cases involving broadcast frequencies, this Court has observed that the "purpose of the First Amendment" is to protect these fundamental rights from infringement, "whether it be by the government itself *or by a private licensee.*" Red Lion Broadcasting Co. v. FCC, 395 U. S. 367, 390 (1969). Even more recently, during the current term, the Court has held that private harrassment of minority political party members gives rise to constitutional protection under the right of association, even in the context of ostensibly neutral state disclosure requirements. Brown v. Socialists Workers '74 Campaign Committee, 51 U. S. L. W. 4015 (1982).

These holdings, it is to be emphasized, were reached on the basis of the Constitution itself, unaided by legislation. It would be anomalous if such protections of association were not found under such legislation as 1985(3), which is intended to supplement and enforce the Constitution.

C. The Congressional debates on the Civil Rights Act of 1871 make clear the legislative intent to include the right of association within the protection of 1985(3).

Two specific types of associational rights are mentioned with great frequency in the legislative history of the Civil Rights Act of 1871: The right to engage in political activity and the right of persons to engage in the "lawful and harmless pursuit of their proper vocation." Sen. Osborne, Cong. Globe 653, April 13, 1871. The legislative history is such as to leave no doubt that protection of the right of association was a central concern of those who enacted 1985(3).

The right of persons to engage in political association is mentioned so often in the legislative history of the Civil Rights Act of 1871 that it dwarfs even the references to racial discrimination. Sen. Sherman stressed that the Ku Klux Klan was "a political organization, with political ends, political aims." Cong. Globe 153, March 18. Rep. Shellabarger charged that the terrorism of the Klan was "done in execution of the political purposes" of that group. Id. 517, April 6. Rep. Roberts noted that acts of violence had been committed against various classes of individuals, but that the unifying theme was that all such groups were engaged in the constitutionally protected right of association with a political party (namely the Republican Party). Id. 412, April 3; see also Osborne, Id. 653, April 13. Numerous other legislators mentioned the political nature of the Klan and the need for the protection of individuals associated with particular organizations within the South. [10]

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10 Rep. Tyner, Cong. Globe 487, April 5; Rep. Wilson, Id. 481, April 5; Rep. Cobb, Id. 436, April 4; Rep. Sheldon, Id. 367, March 31; Sen. Edmunds, Id. 567, April 11; Sen. Stewart, Id. 659, April 13; Rep.

III. EVEN IF STATE ACTION IS REQUIRED UNDER 1985(3) (ALTHOUGH AMICUS CURIAE SUBMITS THAT IT IS NOT), THE RECORD IN THIS CASE CONTAINS AMPLE EVIDENCE OF GOVERNMENT ACTION SUFFICIENT TO SUPPORT A 1985(3) ACTION.

A. This event occurred in "union country," in which union action and governmental action were mutually interdependent in a manner analogous to the "company town" of Marsh v. Alabama.

In Marsh v. Alabama, supra, religious pamphleteers had been forbidden to exercise the rights of expression and association in the public places of a company-owned town. This court held that sufficient "government function" was to be found in the record of the case, so that these fundamental rights were protected from abridgement by ostensibly private action in the company town.

The record in this case strongly supports the conclusion that the violence here at issue occurred in a "union town."[11] Indeed, shortly before the violence began, the record shows that one of the rioters shouted, "Get out . . . man, you all have got to be crazy, you are all crazy, this is a union town." R. 45, testimony

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Showber, Id. 378, April 1; Sen. Schurz, Id. 686, April 14; Rep. Rainey, Id. 393, April 1; Rep. Perce, Id. 511, April 6; Rep. Lowe, Id. 374, March 31; Rep. Lansing, Id. 487, April 5; Rep. Corburn, Id. 457, April 4.

11 Amicus recognizes that the holding of Marsh is not applicable to private activity occurring in a smaller self-contained private enclave such as a shopping center. Hudgens v. NLRB, 424 U. S. 507 (1976). But the present case involves an entire "union town"–indeed, a whole geographic area–and a set of "private" entities, the defendant unions, that exhibit strong interdependence with government. Cf. Terry v. Adams, 345 U. S. 461 (1953).

of Mr. Scott. Ironically, the defendant unions--apparently oblivious to the constitutional significance of their position--have themselves characterized the area as union-dominated in this very litigation. The defendant's brief in the Fifth Circuit contains the following at the beginning of the Statement of Facts:

> Port Arthur, Texas, is one corner of a community generally referred to as the "Golden Triangle," the other two cities being Beaumont and Orange, Texas . . . . *[T]he Golden Triangle area is peculiar in terms of its socio-economic structure. Generally, there are large numbers of working class people concentrated in the area and these workers are highly unionized. The general citizenry of the community tends to align itself on union/non-union lines*, and labor relations is always a sensitive issue in the Golden Triangle, often capturing the front page of the local newspapers.
>
> Thus, the advent of a $8,000,000 non-union construction project in the community was a matter of some local interest . . .
>
> The Sabine area Building and Trades Council is a loose confederation of various construction craft unions in the area . . . and the council holds regular weekly meetings. During the meeting of January 15, 1975 . . . the rumor was discussed--the rumor was to the effect that there would be a "citizens protest" at the Cross Construction site on the following Friday . . . .

In their opening remarks at trial, counsel for both groups of defendants, with remarkable candor, admitted the existence of a local prejudice against non-union outsiders. "It is our understanding that Cross Construction Company employs largely employees from out of state, that local persons in this Golden Triangle area who are out of work might resent that fact." R. 15-16 (Mr. Wheat). Mr. Dies said the following:

> I think the evidence, your honor, will show

> that *what happened here is something indicative of this area we live in, and that is–not indicative of it, but arises from the fact the labor organizations are strong in this area* and when outside contractors come into the area, employing people from outside the state . . . *men working on jobs in the area here hear about it, they ask their union, they ask their officials* . . .

R. 20-21. Mr. Wheat described "unrest in the community with respect to Cross Construction Company . . . . The rumor was apparently very widespread . . . ." R. 235-36. In summary, the general citizenry of the community tended to align itself on union/non-union lines, labor relations was always a sensitive issue, the area was "A union town," and when major social issues arose, the citizenry turned to union officials because they were community leaders.

This political combination made it impossible for the police department or other civil authorities to control violence. The testimony of R. E. Culbertson, Sheriff of Jefferson County, dramatically shows the dependence of law enforcement upon the defendant unions in controlling labor violence. The message of Sheriff Culbertson's testimony was that control of violence sanctioned by union officials would be outside the capacity of civil authorities.[12]

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12 The sheriff testified that "there definitely would be the possibility of . . . a recurrence of this act because . . . of the unrest of the labor movement in this area." Persons such as defendants were engaged in surveillance of license plates of non-union workers, "and in certain ways [they] coerce or otherwise commit actual violence upon these people . . . away from the job site." When asked whether as a practical matter, such violence was "almost impossible for you to defend against?," the Sheriff replied: "It certainly is." At this point, the trial court interrupted to suggest calling in the statewide police force of the Texas Department of Public Safety or the Texas Rangers. R. 31-38.

B. The power and authority of the defendant unions is derived directly from state action.

In addition, it is important to realize that the defendant unions receive their authority and their right to serve as exclusive bargaining agents, as well as considerable statutory protection and, indeed, their very franchise, from government action. The National Labor Relations Act, 29 U. S. C. sections 151 et seq. (West 1964) provides as follows:

> It is declared to be the policy of the United States to [regulate commerce by] . . . encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Cf. Terry v. Adams, 345 U. S. 461 (1953) (the "Jaybird Primary" case) (use of private entities to carry out government policy is a strong indication of state action).

Labor unions are powerful entities. They are especially so, as the evidence shows, in the Golden Triangle area. It is important to emphasize that they derive this authority and power directly from government action expressed in the NLRA. This governmental grant of power and authority is analogous to the situation in Burton v. Wilmington Parking Authority, 365 U. S. 715 (1961). In that case, the Eagle Coffee Shoppe operated a restaurant in "a purely private capacity" under a lease from the State of Delaware. The holding of this Court was that state action existed because of the powers and "benefits . . . conferred" upon the restaurant owner by the state. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance," said the Court.

In this case, the defendant unions have the power to ex-

clude every individual worker from bargaining about his own wage and to serve as the exclusive agent in that process. This power is given the defendants directly by the federal government in the NLRA, and it confers a greater benefit (and consequently a greater responsibility) than that in Burton v. Wilmington Parking Authority, supra. As one commentator has written, "the union's position in the federal scheme of labor regulation, most notably its status as exclusive representative of all the employees in a bargaining unit," provides "the cornerstone" of an argument that "would find union activity to be governmental action."[13] Lang, Toward a Right to Union Membership, 12 Harv. C. R. C. L. L. Rev. 31, 41 (1977); see also Rauh, Civil Rights and Liberties in Labor Unions, 8 Lab. L. J. 874, 881 (1957).

C. Congress intended that the amount of state action shown in this record should suffice to prove a 1985(3) claim, because this situation is precisely analogous to the conditions that allowed the Klu Klux Klan to invade the right of association of Blacks and Republicans.

There can be little question that the drafters of 1985(3) intended it to apply in the circumstances disclosed by this record. Speaker after speaker rose to denounce the Ku Klux Klan and the state action (or lack thereof) that allowed it to flourish. The following is an example:

> I understand the argument to be that inasmuch as the alleged lawless acts sought to be corrected by the bill [i.e., those of the Ku Klux

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13 Amicus curiae recognizes that state action cannot be inferred from mere neutral regulation, or even "detailed regulation." E.g., Moose Lodge v. Irvis, 407 U. S. 163 (1972); Flagg Bros., Inc. v. Brooks, 436 U. S. 149 (1978). But the instant case involves direct grant of extensive powers. It also makes those powers exclusive, as in collective bargaining, and "exclusivity" is a feature indicating state action–as is the government's use of defendants to carry out national policy regarding commerce. Flagg Bros., Inc. v. Brooks, supra.

> Klan] are not done in pursuance of any law or act of the states, that as there is no state authority or laws impeding the citizens in the enjoyment of their rights, the section quoted does not apply. *It is said that the states are not doing the objectionable acts. This argument is more specious than real. Constitutions and laws are made for practical operation and effect* . . . . What practical security would this provision give if it could do no more than to abrogate and nullify the overt acts and legislation of a state? If a state has no law upon its statute book obnoxious to objection under the article referred to, but nevertheless permits the rights of citizens to be systematically trampled upon without color of law, of what avail is the constitution to the citizen?

Id. at 375 (remarks of Rep. Lowe). Another speaker said, "I do not want to see this [Civil Rights Act] so amended that there shall be taken out of it the frank assertion of the power of the national government to protect life, liberty and property, *irrespective of the act of the state*." Id. at 141 (remarks of Rep. Shanks). The drafters of 1985(3) were particularly concerned about the situation in which the state was unwilling (or unable) to provide protection of constitutional rights, a situation that the record amply demonstrates was prevalent in the Golden Triangle during the events that led to this suit.

In summary, there can be little question that the drafters of 1985(3) intended it to apply to private conspiracies, with or without governmental action.[14] But if it is concluded, contrary

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14 Defendants appear to argue that Congress may not have had power to deal with private conduct under circumstances such as these. This argument is refuted by, e.g., Katzenbach v. McClung, 379 U. S. 294 (1964) and United States v. Guest, supra. There can be no real question that Congressional power is present. Nor, in light of the legislative history, can there be any doubt of the Congressional intent to reach private conduct under the circumstances of this case.

to the arguments of this amicus curiae, that state action is required, there is ample evidence in this record demonstrating government interrelationship with the defendants and with the event, and this state action is clearly sufficient to support a 1985(3) claim if the intent of Congress is recognized.

CONCLUSION

For the reasons given herein, and for the reasons given in the brief of plaintiffs-respondents, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have, prior to the filing of this Brief, served three (3) copies each upon all counsel of record by depositing such copies in a United States Post Office, namely the Central Post Office at Houston, Texas, first class postage prepaid, addressed to: Martin Dies, Stephenson, Thompson & Dies, Box 490, Orange, Texas 77630 and Robert Q. Keith, Mehaffy, Weber, Keith & Gonsoulin, Box 155, Johnson City, Texas 78636, all in accordance with Rule 28.3 of the Rules of this Court.

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MAR 3 1983

No. 82-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BILL MOORE, ET AL.,
Petitioners,

v.

PAUL E. SCOTT, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE, AND BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS AMICUS CURIAE FOR RESPONDENTS

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Right to Work (NRTW) Legal Defense Foundation respectfully moves for leave to file the annexed brief as amicus curiae and would show the Court as follows:

1. Interest of Amicus Curiae:

The National Right to Work Legal Defense Foundation assists the individual's enforcement of rights to work, association, speech and to other fundamental liberties infringed by compulsory unionism arrangements. The Foundation acts to protect both organized

and unorganized workers who resist unlawful compulsion to join or assist labor organizations.

The issues in this case have major ramifications for employees faced with discrimination and violence because they choose to work and associate on premises of equality with others who chose to belong to a labor organization. The problem of violence in this country attributable to a worker's exercise of protected choice to pursue a lawful nonconforming course is alarming. If 42 U.S.C. § 1985(3) is interpreted to protect members of all recognizable classes against private conspiratorial interference with freedom of association, then all workers will benefit.

2. Purpose of this Brief:

The Foundation's brief amicus curiae addresses particularly the questions whether non-union workers can be a "class" subject to invidiously discriminatory designs of a lawless, private group and whether resulting deprivations of federal rights are remediable under 42 U.S.C. § 1985(3). The brief suggests an analytical framework to apply to the animus element of the statute in order to provide a remedy to those persons within the intendment of Congress while avoiding the potential for § 1985(3) to become a font of "general federal tort law."

The Foundation avoids duplication of the issues and arguments already adequately briefed. However, the Foundation cannot avoid adding to the historical considerations and public policy arguments bearing upon the proper interpretation of the "class-based animus" requirement of the statute. These considerations—historical and policy alike—underpin the proposed analy-

sis by focusing upon the conspiratorial purpose, or design, and the causal effect upon equality of opportunity and personal choice which the 42nd Congress sought to secure.

The Foundation respectfully submits that it can and will fully advocate the rights of workers to have their associational choices respected without fear of coercion or violence.

FOR THESE REASONS, NRTW Legal Defense Foundation requests that it be granted leave to file the attached amicus curiae brief.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The interest of the "amicus curiae" is contained in the Motion For Leave to File this Brief and adopted herein.

SUMMARY OF ARGUMENT

The class-based animus requirement of § 1985(3) is tested and satisfied in the analysis of the conspirator's purpose or design rather than in the analysis of the plaintiff's criterion for membership in some well defined class deemed protected. The history behind the

statute—Congress' intention to secure the Thirteenth and Fourteenth Amendment power of the federal citizen to compete for economic and personal opportunity—demands a flexible treatment of the class requirement. A conspiracy designed and implemented to have the natural consequences of foreclosing opportunities to citizens to use their skills, to contract for compensation, to perform a contract of employment, and to choose their associates in the personal experiences of life is class-based in the view of the 42nd Congress. Such a conspiratorial presence in a free society deprives the object of legal equality and relegates the target to inferior status. That is the invidiously discriminatory class animus that § 1985(3) proscribes and remedies.

ARGUMENT

THE LOWER COURTS AND THE BAR NEED AN ANALYTICAL FRAMEWORK AND DIRECTION IN APPLYING THE CLASS-BASED INVIDIOUSLY DISCRIMINATORY ANIMUS REQUIREMENT OF A § 1985(3) CLAIM

The class-based discriminatory animus requirement of § 1985(3) has proven to be the most elusive and the one most inconsistently treated by the lower courts. A workable analysis by this Court of the discriminatory animus requirement will enable the lower federal courts to more consistently apply 42 U.S.C. § 1985(3) and justly grant the protections of federal law to those whom the 42nd Congress intended to protect.

A PLAINTIFF SEEKING § 1985(3) REMEDIES NEED SHOW THE CONSPIRATORIAL DESIGN OR PURPOSE, AND THE PROXIMATE EFFECT OF AN IMPLEMENTING ACT UPON PROTECTED RIGHTS. THE OBJECT OF THE CONSPIRACY, NOT THE ATTRIBUTES OF THE VICTIM, DETERMINES THE CLASS

Class-based animus should be tested by taking two necessary and sufficient factors into account. First, the Court should look to the purpose of the conspirators. Did a constitutionally relevant animus lead them to commit their injurious acts? The Court's analysis would focus upon the *aim* of the conspirator to determine if the conspiracy was designed to interfere with the exercise of fundamental rights.

Second, the Court should determine whether the conspiracy had the *effect* of interfering with the victim's exercise of fundamental rights. The question is whether the rights or privileges allegedly deprived—such as the rights of free speech and association—are ones which the 42nd Congress protected from infringement by either state or private actors.

Once a court determines that the conspirator's aim is to interfere with the exercise of a protected right, and that right is one that the victims of the conspiracy are attempting to exercise, then the Court should conclude that the remedial protection of § 1985(3) is properly invoked to protect those victims. The universe of protected victims should be identified by their inclusion in the target area of the conspiracy rather than their possession of immutable characteristics or membership in a defined group. Thus, an individual who is harmed because he exercised those protected rights which the conspiracy aims to destroy is entitled to the statute's remedies even though he alone has been harmed. The focus of the test is, thusly,

upon the object and scope of the conspiracy not the personal characteristics of the victim. A test such as this would simplify the job of the lower courts in applying this statute while still retaining a constitutionally based discriminatory animus requirement.

In *Griffin* v. *Breckinridge,* 403 U.S. 88 (1971) the Court implied that the analysis of class based discriminatory animus should begin with the conspirators' design: "The conspiracy, in other words, must *aim* at a deprivation of the equal enjoyment of rights secured by the law to all." *Id.,* 102. In *Griffin* the conspirators' animus was directed against blacks who engaged in civil rights work. The complaint alleged, on the one hand, that plaintiffs were *not* civil rights workers and, on the other hand, that defendants *believed* (mistakenly) that they were civil rights workers. The court did not find improper allegations of class-based discriminatory animus. To the contrary, the Court indicated that class-based animus must be determined from the perspective of the conspirator. Plaintiffs, therefore, need only show what distinctions the conspirators focused upon to mark them for inferior status. Plaintiffs need not show that they belong to some stable, objectively defined group often mistakenly delineated in numerosity terms. *See, e.g., Rodgers* v. *Tolson,* 582 F.2d 315 (4th Cir. 1978); *Bricker* v. *Crane,* 468 F.2d 1228 (1st Cir. 1972).[1] Indeed, the

[1] Amicus does not assert that the conduct of the victims invoking the statute is irrelevant. The conduct of the victims will often provide proof of what constitutionally protected right the conspirators aimed at depriving. In *Glasson* v. *City of Louisville,* 518 F.2d 899 (6th Cir.), *cert. denied,* 423 U.S. 930 (1975) the court implicitly recognized that it is the aim of the conspirators which is primary but the conduct of the victims will provide a means of identifying the discriminatory animus. *Id.,* 912.

very concept of class in a free society embodies the notion of equality of opportunity for movement to another class; and, equal chance for personal life experiences is determined by any individual's power, such as the power to dispose of one's skills for the sake of income. *See, e.g.*, H. Gerth & C. Wright Mills, *From Max Weber: Essays in Sociology*, p. 181 (Oxford U. Press, 1946).

The legislative history of the statute supports the view that it is the discriminatory purpose of the conspirators which contributes to liability under the statute. Senator Edmunds stated "[W]e do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or a set of men against another . . . but, if in a case like this, it should appear that this conspiracy was *found against this man because* he was a Democrat . . . or *because* he was a Catholic . . . or *because* he was a Vermonter . . . then this section could reach it." Cong. Globe, 42nd Cong., 1st Sess. 567 (1871) (emphasis added). These comments strongly support the position that the purpose of the conspirators was a major factor in finding a cause of action under the statute. If the aim of the conspirators is to burn a barn only for the sake of arson, no violation of the statute could be shown. But, if the act of barn burning results from a purpose to harm owners because they are black, or chose membership in a certain political party or voluntary social organization, then the constitutionally relevant animus requirement would be satisfied. Congress intended to secure the individual's power to embrace opportunity and to give each citizen an equal chance for personal experience free of usurping conspiratorial purposes.

SECTION 1985(3) PROSCRIBES A CONSPIRACY THAT AIMS TO DEPRIVE ANYONE OF FREE CHOICE TO LIVE AND WORK IN A PARTICULAR PLACE, TO EARN AND PURSUE A LIVELIHOOD, TO ENTER AND PERFORM CONTRACTS TOWARDS THESE PURPOSES, AND TO ASSOCIATE

The Court should consider the Thirteenth Amendment and the privileges and immunities clause of the Fourteenth Amendment as historical sources of the rights infringed by the petitioners. Congress acted through these amendments to safeguard private rights inadequately protected prior to the Civil War. The amendments authorize Congressional enforcement of the rights granted. Those rights, federal rights, are at stake in this case.

Section 2 of the Thirteenth Amendment authorized Congress to regulate private conduct in order to abolish all badges and incidents of slavery and to "vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery." *Civil Rights Cases,* 109 U.S. 3, 22, 23 (1883). *See also Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 440, 442-43 n.78 (1968) (overruling *Hodges* v. *United States,* 203 U.S. 1 (1906)). Section 5 of the Fourteenth Amendment authorizes Congress to protect the privileges and immunities of national citizenship. These include rights of substantive liberty as contemplated in the preamble to our constitution. *United States* v. *Guest,* 383 U.S. 745, 762, 782 (1966); *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966).

The right to work and the right to seek opportunity to work in each geographical area of the country free of unlawful coercion is a precious liberty. *Barsky* v.

Board of Regents, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting); *Hampton* v. *Mow Sun Wong,* 426 U.S. 88, 102 (1976). *See also Slaughter House Cases,* 83 U.S. (16 Wall.) 36 (1873) (right to carry on lawful trade is a fundamental right of citizen).

Liberty means not only the freedom to live and work where one wills, but also the freedom to earn and pursue a livelihood and to enter into and perform contracts necessary to carry out these purposes. Nothing is more fundamental to the rights of free men and "the essence of citizenship." The power to make and perform contracts of employment was an essential distinction between free men and slaves. *Jones* v. *Alfred H. Mayer,* 392 U.S., at 420-37.

Furthermore, it is apparent that the type of institutionalized and recurrent violence that was directed against the respondents was the very type of violence which the 42nd Congress intended to remedy. Its intent was to secure the opportunity for contractual and associational equality threatened by private lawlessness and violence "post bellum." The individual respondents chose to exercise constitutional and statutory rights according to their individual beliefs. The perpetrators' violent acts arose from their refusal to respect respondents' equal right to make these choices. Whatever analysis may be proper to achieve the Congressional intent, these rights are so precious that their individual exercise must be safeguarded. *NAACP* v. *Alabama,* 357 U.S. 449 (1958).

RESPONDENTS WERE INJURED BY A PROSCRIBED CONSPIRACY AND IT IS IMPORTANT TO THE EQUALITY OF ASSOCIATIONAL CHOICE TO CONFIRM THE AVAILABILITY OF § 1985(3) REMEDIES

Applying this proposed analysis to the instant case, it is apparent that respondents suffered a remediable injury. The conspirators' design was to drive respondents out of their jobs, out of business, and literally out of all opportunities in the geographic area solely because respondents chose to exercise their right not to join a union and their right to seek employment in a chosen place. Petitioners set upon a course of action designed to deprive respondents' equal right to exercise free speech, associational choices, and other liberty. The facts found below speak eloquently to the nature of the invidious animus.

Cross Construction Company offered employment and opportunity to compete solely on the basis of occupational skills without regard to union affiliation. *Scott* v. *Moore,* 680 F.2d 979, 983 (5th Cir. 1982) (en banc). However, local hostility developed against Cross employees because they had not entered into a union contract and had come from outside the community. *Ibid.* As a result of the conspiratorial acts and the resulting violence, some employees refused to work and Cross Construction Company defaulted in its contractual performance. *Id.,* 984. This was precisely the result the conspiracy intended to achieve.

Petitioners used means of intimidation and force to compel the Cross Company and its employees to abandon their right to work in the Port Arthur area of the United States and to desist from performing their employment and construction contracts. It is the conspiracy and its invidious design rather than

the means that brings this case into the federal sphere of protection. The conspirators intended to subject respondents to their will and to establish or maintain themselves as a majoritarian social and economic power in the community. They sought to deprive the equality of rights and privileges to any one who disagreed with them. It is because respondents sought to enjoy and exercise the same rights and privilages that petitioners enjoy and exercise—the right to live and work where one wills, to earn a livelihood, to contract to carry out these purposes, and to freely associate—that the conspirators aimed at them.

Differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equality under the laws. But, from time to time, other differences from the community norm may define other persons or groups which need the same protection. It was the aforementioned characteristics of choice—workplace and associational choices—that distinguished respondents from the community norm and animated the conspiracy. These characteristics are as clear and obvious a part of the conspiratorial design as would be the immutable characteristic of race. It is that design which 42 U.S.C. § 1985(3) properly proscribes and remedies.

The Court must take notice of the fact that the discriminatory animus visited upon this group of non-union workers is not a new or isolated instance in American history. The Federal and State Reporters overflow with old and new cases detailing the horrors of mass union violence directed at peaceful non-union employees, and "open shop" employers. The circumstances of the Altemose Construction Company riots

speak eloquently to this; and, furthermore, are strikingly parallel to the situation at Port Arthur. *See Altemose Construction Co.* v. *Bldg. & Const. Trades Council,* 449 Pa. 194, 296 A.2d 504 (1972); *Altemose Construction Co.* v. *NLRB,* 514 F.2d 8 (3d Cir. 1975). As in the instant case, unionized workers, in what was described by the Pennsylvania court as a "virtual military assault," chartered buses and descended upon the non-union (open shop) construction site. Property damage ranged into the hundreds of thousands of dollars, and serious bodily injury was inflicted on workers, security guards, police and firemen. A recitation of these facts indicates that such discriminatory animus, directed against workers with a different political and social point of view, is not uncommon.

These incidents of unionized mob violence have recurred at an alarming rate for decades. In addition to the *Altemose cases, see, e.g., Kayser-Roth Corp.* v. *Textile Workers Union,* 479 F.2d 524 (6th Cir. 1973); *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U.S. 287 (1941); *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America* v. *American Metal Products Company, Inc.,* 408 S.W.2d 682 (Tenn. 1964); *United Construction Workers* v. *New Burnside,* 274 S.W.2d 787 (Ky. 1955); *United Mine Workers of America, District 31,* 95 N.L.R.B. 546 (1951). While economics may be a major factor in these violent disputes, it cannot be denied that individual constitutional rights are entangled.

To the extent that a decision in this case must be reconciled with national labor policy, *see, e.g., Connell Construction* v. *Plumbers and Steamfitters,*

421 U.S. 616, 624-25 (1975), a decision affirming the lower court will have a salutory effect. It will ensure labor stability consistent with federal labor policy. It will introduce certainty into the area of civil rights jurisprudence where it touches upon associational choices in the workplace. It will reduce mob violence by placing the perpetrators on notice that their victims will have a sure and complete federal remedy. Nothing in the labor policy of the United States, as expressed in the statutes and the decisional law of this Court, requires a finding that the Civil Rights Act was not meant, and should not be interpreted, to give a remedy under the facts of this case.

CONCLUSION

For the foregoing reasons, and for those reasons expressed by respondents, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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DATE: March 2, 1983

No. 82-486-CFX
Status: GRANTED

Title: United Brotherhood of Carpenters and Joiners of America, Local 610, AFL-CIO, et al., Petitioners
v.
Paul E. Scott, et al.

Docketed:
September 20, 1982

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Gold, Laurence

Counsel for respondent: Keith, Robert Q.

Entry	Date	Note	Proceedings and Orders
1	Sep 20 1982	G	Petition for writ of certiorari filed.
2	Sep 20 1982		Appendix of petitioner Un. Bhd. of Carpenters, et al. filed.
4	Oct 18 1982		Order extending time to file response to petition until November 6, 1982.
5	Nov 5 1982		Brief of respondent Paul E. Scott, et al. in opposition filed.
6	Nov 10 1982		DISTRIBUTED. November 24, 1982
7	Nov 18 1982	X	Reply brief of petitioner Un. Bhd. of Carpenters, et al. filed.
8	Nov 29 1982		Petition GRANTED.
			**********
9	Dec 6 1982		Record filed.
10	Dec 6 1982		Certified original record & C.A. proceedings, 6 volumes, received.
12	Dec 17 1982		Order extending time to file brief of petitioner on the merits until February 1, 1983.
13	Jan 14 1983		Order further extending time to file brief of petitioner on the merits until February 4, 1983.
14	Feb 3 1983		Order further extending time to file brief of petitioner on the merits until February 7, 1983.
15	Feb 7 1983		Joint appendix filed.
16	Feb 7 1983		Brief of petitioner Un. Bhd. of Carpenters, et al. filed.
17	Mar 3 1983	G	Motion of National Right to Work Legal Defense Foundation for leave to file a brief as amicus curiae filed.
19	Mar 3 1983		Order extending time to file brief of respondent on the merits until March 18, 1983.
20	Mar 16 1983	G	Motion of Associated Builders & Contractors, Inc. for leave to file a brief as amicus curiae filed.
21	Mar 21 1983		Motion of National Right to Work Legal Defense Foundation for leave to file a brief as amicus curiae GRANTED.
22	Mar 18 1983		Brief amicus curiae of Chamber of Commerce of the U.S. filed.
23	Mar 21 1983	G	Motion of Legal Foundation of America for leave to file a brief as amicus curiae filed.
24	Mar 22 1983	G	Motion of American Civil Liberties Union for leave to file a brief as amicus curiae filed.
25	Mar 23 1983		Brief of respondents Paul E. Scott, et al. filed.
26	Mar 28 1983		Motion of Associated Builders & Contractors, Inc. for leave to file a brief as amicus curiae GRANTED.

No. 82-486-CFX

Entry	Date	Note	Proceedings and Orders
27	Mar 28 1983		Motion of Legal Foundation of America for leave to file a brief as amicus curiae GRANTED.
28	Apr 4 1983		Motion of American Civil Liberties Union for leave to file a brief as amicus curiae GRANTED.
29	Apr 12 1983		SET FOR ARGUMENT. Tuesday, April 26, 1983. (3rd case) In place of No. 82-647, Kirkpatrick v. Christian Homes.
30	Apr 22 1983	X	Reply brief of petitioners Un. Bhd. of Carpenters, et al. filed.
31	Apr 26 1983		ARGUED.